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Case No. 83-710

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HARRY J. BERKEMER, SHERIFF
OF FRANKLIN COUNTY, OHIO,
Petitioner,

v.

RICHARD N. McCARTY,
Respondent.

**ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

PETITION FOR WRIT OF CERTIORARI

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THE QUESTION PRESENTED FOR REVIEW

Whether law enforcement officers must give "*Miranda* warnings" to individuals arrested for misdemeanor traffic offenses. (*Miranda v. Arizona*, 384 U.S. 436).

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Case No. _____

IN THE

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HARRY J. BERKEMER, SHERIFF
OF FRANKLIN COUNTY, OHIO,
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**ON WRIT OF CERTIORARI TO
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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the District Court for the Southern District of Ohio, Eastern Division, is reported at page A-10 of the Appendix. The opinion of the Court of Appeals for the Sixth Circuit is reported at page A-14 of the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was made and entered on September 6, 1983. A motion to stay issuance of the mandate was sustained by the Court of Appeals on October 3, 1983. The Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment, United States Constitution, which provides in pertinent part:

> "* * * nor shall be compelled in any criminal case to be a witness against himself, * * *"

STATEMENT OF THE CASE

The question for review herein was initially before the Ohio state courts in the case of *State of Ohio v. Richard N. McCarty*, on a charge of operating a motor vehicle while under the influence of alcohol and/or drugs, a misdemeanor of the first degree under Ohio law.

The facts in this case are not in dispute.

From a stipulation entered into by the state of Ohio and McCarty, (A-1) the trial court rendered a verdict of guilty on a plea of no contest, having overruled McCarty's motion to suppress statements made by him to the State Trooper.

The verdict was affirmed by the Franklin County, Ohio, Court of Appeals, pursuant to the Supreme Court of Ohio's decision in *State v. Pyle*, 19 Ohio St. 2d 64, that the holding of *Miranda v. Arizona*, 384 U.S. 436, is not applicable to misdemeanors.

The Supreme Court of Ohio overruled McCarty's motion in support of jurisdiction for perfection of an appeal.

McCarty then sought relief in the United States District Court via a petition for a writ of habeas corpus, pursuant to 28 U.S.C. 2254. The District Court denied the petition following the decision in *Clay v. Riddle*, 541 F. 2d 456 (4th Cir.) that *Miranda* warnings are not required in commonplace traffic offenses (A-10). McCarty appealed to the United States Court of Appeals for the Sixth Circuit.

The Court of Appeals vacated the conviction of McCarty and remanded for issuance of a writ of habeas corpus.

Because of the untimely demise of Captain Herdman, Harry J. Berkemer, Sheriff of Franklin County, Ohio, has been substituted as petitioner, pursuant to rule.

ARGUMENT

The petition for writ of certiorari should be granted because the United States Court of Appeals for the Sixth Circuit has rendered a decision in conflict with the United States Court of Appeals for the Fourth Circuit, in *Clay v. Riddle*, 541 F. 2d 456 (1976).

In *Clay*, the Fourth Circuit considered the decision of this Honorable Court in *Miranda v. Arizona* 384 U.S. 436 (1966) which involved one being questioned in regard to the commission of a felony as opposed to *Clay*, one being interrogated about a traffic offense.

The Fourth Circuit also discussed decisions from several State Supreme Courts that had had the same issue before them and concluded that the unlawful incident involved - a traffic offense - did not require that *Miranda* warnings be given under the circumstances.

In Ohio, the issue was decided in 1969 by the decision in *State v. Pyle*, 19 Ohio St. 2d 64, which also recognized the priciples set forth in *Miranda*.

In *Pyle*, the Supreme Court of Ohio, as did the Fourth Circuit in 1976, decided that *Miranda* warnings were not required in misdemeanor traffic offenses.

Now, the Sixth Circuit has rendered its decision in conflict with the Fourth Circuit, Ohio , and other states, and requires *Miranda* warnings to be given during interrogation of persons involved in traffic offenses.

The Sixth Circuit decision not only changes the law of Ohio, as pronounced in *Pyle, supra*, in 1969, but also all other states under its jurisdiction; Michigan, Kentucky and Tennessee.

The constitutional question presented for review is of the utmost public interest and importance throughout the United States, and to all law enforcement agencies at every level of government, as well as the public in general.

In addition to the conflicting decisions of the Fourth Circuit and Sixth Circuit Courts of Appeals, the cases of *Capler v. Greenville*, 207 So. 2d 339 (Miss. 1969) *cert. denied*, 392 U.S. 941; *State v. Bliss*, 238 A. 2d 848 (Del. 1968); *State v. Gabrielson*, 192 N.W. 2d 792 (Iowa 1969); *State v. Macuk*, 268 A. 2d 1 (N.J. 1970); and *State v. Neal*, 476 S.W. 2d 547 (Mo. 1972), do not require *Miranda* warnings to be given to persons in custody for misdemeanor traffic offenses.

Cases with the opposite view are *Campbell v. Superior Court*, 479 P. 2d 685 (Ariz. 1971); *State v. Darnell*, 508 P. 2d 613 (Wash. 1973) *cert. denied* 414 U.S. 1112; *State v. Fields*, 294 N.W. 2d 404 (N.D. S. Ct. 1980); and *State v. Lawson*, 204 S.D. 2d 843 (N.D. 1974).

CONCLUSION

WHEREFORE, Petitioner prays that a Writ of Certiorari issue from this Honorable Court to review the judgment of the United States Court of Appeals for the Sixth Circuit, because the question presented has not been finally decided by the United States Supreme Court, but should be, so that the applicability of *Miranda* warnings will be uniform throughout the United States.

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369 South High Street
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(614) 462-3555

Attorney for Petitioner

CERTIFICATE OF SERVICE

This is to certify that three copies of the foregoing Petition for Writ of Certiorari were mailed to R. William Meeks, Attorney for Respondent, 503 South High Street, Columbus, Ohio, 43215, by regular United States Mail this 27th day of October, 1983.

STEPHEN MICHAEL MILLER
Prosecuting Attorney

APPENDIX

IN THE FRANKLIN COUNTY MUNICIPAL COURT COLUMBUS, OHIO

STATE OF OHIO,	:	
Plaintiff,	:	
vs.	:	Case No. 123915 (1980)
RICHARD N. McCARTY,	:	
Defendant.	:	

STIPULATION

The following stipulation is entered into by defense counsel, R. William Meeks, and Assistant City Prosecutor, James Sika. The purpose of this stipulation is to dispense with the necessity of an evidentiary hearing in open court, since there is agreement concerning the essential facts giving rise to this constitutional issue and the particular legal issues to be presented on appeal stemming from the Court's overruling of the Defendent's Motion to Suppress Custodial Statements.

Had there been an evidentiary hearing, the defense would have called as a witness Trooper C.J. Williams of the Ohio State Highway Patrol. His stipulated testimony is as follows: On March 31, 1980, Trooper Williams, while on his regularly assigned duty, observed the Defendant's vehicle traveling south on Interstate 270 at milepost 30. Trooper Williams observed the Defendant's vehicle weaving in and out of its expected lane of travel. Trooper Williams followed the Defendant's vehicle for approximately two miles, at which time it was stopped and the Defendant was asked to exit the car. Trooper Williams observed that the Defendant needed support to keep himself from falling as he got out of his vehicle.

At this time, Trooper Williams concluded that the Defendant would be charged with a traffic offense and, therefore, his freedom to leave the scene was terminated. The Defendant was then asked to perform the field sobriety test, designated as the "balance test," and according to Trooper Williams, he was "falling." While still at the scene of the arrest, Trooper Williams questioned the Defendant concerning his use of intoxicants and the Defendant replied that he had consumed two beers and had smoked several joints of marijuana a short time before. While questioning the Defendant, Trooper Williams noticed that the Defendant's speech was very slurred and mush-mouthed and it was very hard to understand him. The Defendant was then formally placed under arrest for operating a vehicle while under the influence of alcohol and taken to the Franklin County Jail for an intoxilyzer test to determine the percentage of alcohol present in the Defendant's system. The result of the test was .000.

While at the Franklin County Jail, Trooper Williams continued to question the Defendant in order to fill out the information sought by the State Highway Patrol Alcohol Influence Report. (A copy of the completed Alcohol Influence Report is admitted as a joint exhibit and is formally made a part of the stipulation herein.) While questioning the Defendant concerning information contemplated by the Alcohol Influence Report, Trooper Williams asked the Defendant if he had been drinking, to which the Defendant responded in the affirmative. Trooper Williams asked the Defendant if he were under the influence of alcohol, to which the Defendant repsonded, "I guess, barely." Trooper Williams asked the Defendant if the marijuana he admitted smoking had been treated with another chemical and requested the Defendant to write out his response. As indicated on the Alcohol Influence Report form under the section designated "Remarks,"

the Defendant responded in writing "no angle [sic] dust or PCP in the pot. Rick McCarty."

It is further stipulated between the parties that Trooper Williams did not advise the Defendant of his constitutionally protected rights, announced in *Miranda v. Arizona*, prior to questioning the Defendant either at the scene of the arrest or later in custody at the Franklin County Jail.

/s/Golden, Sep 16 1980
SIDNEY H. GOLDEN, JUDGE

Approved:

/s/R, William Meeks
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/s/W. James Sika
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A-4

IN THE COURT OF APPEALS OF
FRANKLIN COUNTY, OHIO

No. 80AP-680

State of Ohio,
Plaintiff-Appellee,
v.
Richard N. McCarty,
Defendent-Appellant.

DECISION

Rendered March 10, 1981

MR. GREGORY S. LASHUTKA, City Attorney,
MR. RONALD J. O'BRIEN, City Prosecutor,
MR. DAVID E. TINGLEY, Assistant,
375 South High Street,
Columbus, Ohio 43215
For Plaintiff-Appellee.

MR. R. WILLIAM MEEKS,
503 South High Street,
Columbus, Ohio 43215,
For Defendant-Appellant.

REILLY, J.

This is an appeal from a judgment of the Franklin County Municipal Court.

Appellant has perfected this appeal, including one assignment of error:

"The Trial Court erred by overruling Appellant's Motion to Suppress Statements following his arrest for driving a motor vehicle under the influence of drugs where such statements were taken in violation of the Appellant's right against self-incrimination

and right to counsel, thereby violating the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 16 of the Ohio Constitution."

The record shows that Appellant was charged with violating R.C. 4511.19, a first degree misdemeanor, when the arresting officer determined that he was operating a motor vehicle under the influence of drugs "marijuana".

Appellant moved to suppress evidence of certain statements he made to the officer. The court overruled the motion. Appellant pled no contest and was found guilty as charged.

Counsel entered the following stipulation, which was signed by the trial judge:

"Had there been an evidentiary hearing, the defense would have called as witness Trooper C.J. Williams of the Ohio State Highway Patrol. His stipulated testimony is as follows: On March 31, 1980, Trooper Williams, while on his regularly assigned duty, observed the Defendant's vehicle traveling south on Interstate 270 at milepost 30. Trooper Williams observed the Defendant's vehicle weaving in and out of its expected lane of travel. Trooper Williams followed the Defendant's vehicle for approximately two miles, at which time it was stopped and the Defendant was asked to exit the car. Trooper Williams observed that the Defendant needed support to keep himself from falling as he got out of his vehicle.

"At this time Trooper Williams concluded that the Defendant would be charged with a traffic offense and, therefore, his freedom to leave the scene was terminated. The Defendant was then asked to perform the field sobriety test, designated as the 'balance

test,' and according to Trooper Williams, he was 'falling.' While still at the scene of the arrest, Trooper Williams questioned the Defendant concerning his use of intoxicants and the Defendant replied that he had consumed two beers and had also smoked several joints of marijuana a short time before. While questioning Defendant, Trooper Williams noticed that the Defendant's speech was very slurred and mush-mouthed and it was hard to understand him. The Defendant was then formally placed under arrest for operating a motor vehicle while under the influence of alcohol and taken to the Franklin County Jail for an intoxilyzer test to determine the percentage of alcohol present in the Defendant's system. The result of the test was .000.

"While at the Franklin County Jail, Trooper Williams continued to question the Defendant in order to fill out the information sought by the State Highway Patrol Alcohol Influence Report. (A copy of the completed Alcohol Influence Report is admitted as a joint exhibit and is formally made a part of the stipulation herein.) While questioning the Defendant concerning information contemplated by the Alcohol Influence Report, Trooper Williams asked the Defendant if he had been drinking, to which the Defendant responded in the affirmative. Trooper Williams asked the Defendant if he were under the influence of alcohol, to which the Defendant responded 'I guess, barely.' Trooper Williams asked the Defendant if the marijuana he admitted smoking had been treated with another chemical and requested the Defendant to write out his response. As indicated on the Alcohol Influence Report form under

the section designated 'Remarks,' the Defendant responded in writing 'no angle [sic] dust or PCP in the pot. Richard McCarty.'

"It is further stipulated between the parties that Trooper Williams did not advise the Defendant of his constitutionally protected rights, announced in *Miranda v. Arizona*, prior to questioning the Defendant either at the scene of the arrest or later in custody at the Franklin County Jail."

The crux of this case is whether the *Miranda* rights concerning the custodial interrogation of an accused, extends to misdemeanor cases. The Supreme Court held in *State v. Pyle*, (1969), 19 Ohio St. 2d 64, in paragraph one and two of the syllabus:

"1. In Ohio, a misdemeanor or a minor offense is a crime for which a person may not be imprisoned in the penitentiary, and may not be imprisoned for more than one year. (Section 1.05 and 1.06, Revised Code, construed and applied.)

"2. The holding of *Miranda v. Arizona*, 384 U.S. 436, is not applicable to misdemeanors, as presently defined in Ohio."

Further, this Court wrote in the unreported decision *State v. Winkfield*, No. 72AP-346, Franklin County Court of Appeals, rendered on July 24, 1973 (1973 Decisons, page 2150 at 2154-2155) as follows:

"The Ohio Supreme Court has held in *State v. Pyle*, (1969), 19 Ohio St. 2d 64, syllabus paragraph 2, that *Miranda v. Arizona*, (1965) 384 U.S. 436, is not applicable to misdemeanors. The court amplified the syllabus at page 67 of the decision as follows:

" 'It is a fact so well known that judicial notice can be taken that the investigative procedures ordinarily

followed with respect to misdemeanors by law enforcement officers differ markedly from the investigative procedures ordinarily followed with respect to felonies. No law enforcement agency possesses the physical facilities, or the manpower, to investigate and interrogate each person suspected of a misdemeanor to the degree and extent accorded each person suspected of a felony. Nor is there usually any necessity for concentrated investigation or interrogation. In the great majority of misdemeanor cases (traffic offenses). the offense has taken place in the presence of the arresting officer. Nearly all interrogation occurs, as in the instant case, at or near the scene of the infraction, not in any coercive atmosphere created by the law enforcement authorities.'

"Hence, *Argersinger, supra,* by extending the right of counsel at trial, does not extend to misdemeanor in-custodial interrogations within the Sixth Amendment right of counsel. * * *"

Whereupon, for the foregoing reasons, appellant's assignment of error is not well taken and is overruled. Accordingly, the judgment of the Franklin County Municipal Court is affirmed.

Judgment affirmed.

WHITESIDE and NORRIS, J.J. concur.

IN THE COURT OF APPEALS
OF FRANKLIN COUNTY, OHIO

No. 80AP-680
March 13, 1983

State of Ohio,
Plaintiff-Appellee,
v.
Richard N. McCarty,
Defendant-Appellant.

JOURNAL ENTRY OF JUDGMENT

For the reasons stated in the decision of this court rendered herein on March 10, 1981, the assignment of error is overruled, and it is the judgment and order of this Court that the judgment of the Franklin County Municipal Court is affirmed.

WHITESIDE, REILLY & NORRIS, JJ.

By /s/ Archer E. Reilly
Judge Archer E. Reilly

cc: David E. Tingley
R. William Meeks

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION
December 11, 1981

RICHARD N. McCARTY
Petitioner

vs. Civil Action C-2-81-1118

CAPTAIN HERDMAN
Respondent

OPINION AND ORDER

Petitioner brings this action for a writ of habeas corpus under 28 U.S.C. § 2254. This matter is before the Court on the petition, return of writ, and the briefs and exhibits of the parties.

At trial, he pleaded no contest on a stipulated record and on September 15, 1980 petitioner was convicted of operating a motor vehicle while under the influence of drugs in violation of § 4511.19, Ohio Revised Code. The trial judge sentenced him to ninety (90) days incarceration in the Franklin County Jail which was suspended.

Petitioner appealed his conviction to the Court of Appeals for Franklin County which affirmed the trial court judgment. Thereafeter, he attempted an appeal from the Court of Appeals to the Supreme Court of Ohio, and that court overruled his motion for leave to appeal.

Petitioner alleges that he is deprived of liberty in violation of the Constitution of the United States in that:

(1) His conviction was obtained in violation of his constitutional rights to counsel and against self-incrimination because the police obtained

> incriminating admissions from him during custodial questioning without first providing his *Miranda* warnings.

He contends that law enforcement officers must give the *Miranda* [*Miranda v. Arizona*, 384 U.S. 436 (1966)] warnings to an arrestee prior to a custodial interrogation following an arrest for a misdemeanor traffic offense. The parties have stipulated that petitioner was not informed of his *Miranda* rights prior to in custody questioning by Trooper Williams, the arresting officer.

The United States Supreme Court has not considered whether *Miranda v. Arizona, supra*, applies in cases involving traffic offenses or other misdemeanors. *Lewis v. New Jersey*, 414 U.S. 905 (1979) (White J., dissenting). The Supreme Court of Ohio has held that *Miranda* does not apply to misdemeanor cases, *State v. Pyle*, 19 Ohio St. 2d 64, 249 N.E. 2d 826 (1969) *cert. denied*, 396 U.S. 1007, and the prevailing view is that *Miranda* does not apply to traffic offenses. *Clay v. Riddle*, 541 F. 2d 456 (4th Cir. 1976); *State v. Neal*, 476 S.W. 2d 547 (Mo. 1972); *State v. Bliss*, 238 A. 2d 848 (Del. 1968); *Copler v. Greenville*, 207 So. 2d 339 (Miss. 1969) *cert. denied*, 392 U.S. 941; *State v. Macuk*, 268 A. 2d 1 (N.J. 1970). *See also, State v. Gabrielson*, 192 N.W. 2d 792 (Iowa 1969). *But see, State v. Lawson*, 204 S.E. 2d 843 (N.D. 1974); *State v. Darnell*, 508 P. 2d 613 (Wash. 1973), *cert. denied*, 414 U.S. 1112; *Campbell v. Superior Court*, 479 P. 2d 685 (Ariz. 1971). *Contra, State v. Fields*, 294 N.W. 2d 404 (N. D. S. Ct. 1980); *State v. Lawson*, 204 S.E. 2d 843 (N.C. S. Ct. 1974).

In *Clay v. Riddle*, 541 F. 2d at 457, the United States Court of Appeals for the Fourth Circuit stated:

> . . . [I]t is noteworthy that the unlawful incident was a commonplace event—a traffic offense— a

> breach of the law to which we believe the Supreme Court's decision does not extend. This circumstance alone—not that the misconduct was a misdemeanor as to which *Miranda* has been said to be inopposite—is the basis of our present holding that *Miranda* warnings were not required. . .

The Court finds the reasoning of the Court of Appeals to be persuasive; and accordingly, the Court HOLDS that *Miranda* warnings do not have to be given prior to in custody interrogation of a suspect arrested for a traffic offense.

WHEREUPON, the Court FURTHER HOLDS that the petition is without merit; and, therefore, it is DENIED.

This action is hereby DISMISSED. The Clerk of Court shall enter JUDGMENT for respondent.

/s/ Joseph P. Kinneary
United States District Judge

UNITED STATES DISTRICT COURT
FOR
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Richard N. McCarty

v Case No. C-281-1118

Captain Herdman

JUDGMENT

This action came on for consideration before the Court, The Honorable Joseph P. Kinneary, United States District Judge, presiding. The issues having been duly considered and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED THAT: the petition is without merit and is denied. Action is dismissed. Judgment is for the respondent.

Dated at Columbus, Ohio this 11th day of December, 1981.

JOHN D. LYTER, CLERK

By:/s/
Deputy Clerk

No. 82-3216

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

RICHARD McCARTY,
Petitioner-Appellant,

v.

CAPTAIN HERDMAN,
Respondent-Appellee.

ON APPEAL from the United States District Court for the Southern District of Ohio.

Decided and Filed September 6, 1983.

Before: KENNEDY, MARTIN, and WELLFORD, Circuit Judges.

MARTIN, Circuit Judge, delivered the opinion of the Court, in which KENNEDY, Circuit Judge, joined. WELLFORD, Circuit Judge, (pp.7-8) delivered a separate, dissenting opinion.

BOYCE F. MARTIN, Jr., Circuit Judge. This appeal presents the sole issue of whether law enforcement officers must give "*Miranda* warnings" to individuals in custody for misdemeanor traffic offenses. *See Miranda v. Arizona*, 384 U.S. 436 (1966).

Richard McCarty appeals the denial of his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The petitioner was convicted of operating a motor vehicle while under the influence of alcohol and/or drugs in violation of Ohio Revised Code § 4511.19, a first degree

misdemeanor. Evidence supporting his conviction included incriminating statements which he tried unsuccessfully to suppress. He was sentenced to ninety days in jail, eighty of which were suspended. The Miami County Court of Appeals reversed but the Ohio Supreme Court reinstated the conviction. The district court below denied habeas relief because in its judgment, one arrested for a misdemeanor traffic offense is not constitutionally entitled to *Miranda* warnings. *See, e.g., Clay v. Riddle*, 542 F. 2d 456 (4th Cir. 1976); and *Ohio v. Pyle*, 19 Ohio St. 2d 64 (1969). McCarty appeals from that decision.

The state trooper's arrest report and the parties' stipulation comprised all the facts before the trial judge. Ohio State Trooper Williams observed McCarty's car weaving in and out of its lane while traveling south on Interstate 270 on the evening of March 31, 1980. Trooper Williams stopped the car and asked McCarty to get out. He noticed that McCarty needed support to keep from falling as he exited the vehicle. "At this time Trooper Williams concluded that the defendant would be charged with a traffic offense and, therefore, his freedom to leave the scene was terminated."[1] (Joint stipulation.)

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[1] While the parties so stipulate, we do feel bound by the subjective standards implied in the stipulation. *See* United States v. Harris, 611 F. 2d 170,172 (6th Cir. 1979).

In Lowe v. United States, 407 F. 2d 1391 (9th Cir. 1969), the court stated:

> It follows that *the time when* the officer's intent to arrest is formed has no bearing on the question of whether or not there exists "in custody" questioning. whether a person is in custody should not be determined by what the officer or the person being questioned thinks; there should be an objective standard. Although the officer may have an intent to make

McCarty had difficulty performing the field sobriety balancing test. While still at the scene of the arrest, he told Trooper Williams that he had recently consumed two beers and several joints of marijuana. McCarty's speech was very slurred and Trooper Williams had difficulty understanding him.

Trooper Williams placed McCarty under formal arrest and took him to the county jail for an intoxilyzer test. The test showed no alcohol in McCarty's system. At the jail, McCarty answered Trooper Williams' questions for the State Highway Patrol Alcohol Influence Report. McCarty responded that he was "barely" under the influence of alcohol. At Trooper Williams' request, McCarty wrote on the report that the marijuana he had smoked had not been treated with "PCP"or "angel dust." At no time, either before or after McCarty was taken into custody, did Trooper Williams advise him of his constitutional rights.

Before the trial judge, McCarty moved to exclude his statements to Trooper Williams. His motion was denied. He pleaded *nolo contendere* and was found guilty of driving while intoxicated.

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an arrest, either formed prior to, or during the questioning, this is not a factor in determining whether there is present "in-custody" questioning. It is the officer's statements and acts, the surrounding circumstances, gauged by a "reasonable man" test, which are determinative.

Id. at 1397; *accord*, United States 1. Booth, 669 F. 2d 1231, 1235 (9th Cir. 1981). *See also* Oregon v. Mathiason, 429 U.S. 492, 495 (1977).

[1] Habeas relief after a guilty plea is permissible. *See* Lefkowitz v. Newsome, 420 U.S. 283 (1975) (Justices White, Powell, Burger, and Rehnquist dissenting.)

McCarty argued consistently, at both state and federal levels [2] that *Miranda v. Arizona* required law enforcement officers to advise all persons taken into custody of their constitutional rights to counsel and to remain silent. Because he was not so advised when arrested for drunken driving, he maintains that the statements he made while in police custody cannot support his conviction. We agree.

In *Miranda*, the Supreme Court held that an individual in police custody may not be interrogated until and unless he is first advised that he has the right to remain silent; that anything he says may be used against him; that he had the right to an attorney; and that an attorney will be appointed for him if he cannot retain one. These warnings are an "absolute prerequisite to interrogation," said the court, 384 U.S. at 467, and without the warnings, the fruits of a custodial interrogation are inadmissible at trial.

> To summarize, we hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege. . . But unless and until such warnings are demonstrated . . . , no evidence obtained as a result of interrogation can be used against him.

384 U.S. at 478-479 (footnote omitted).

Miranda, then, creates procedural safeguards to secure the fifth amendment privilege against self-incrimination. Although felony offenses were specifically in issue in *Miranda* and its companion cases, the language of the opinion does not limit the safeguards to individuals suspected of felonies. Similarly, yet more importantly, the language of the fifth amendment does not limit the privilege

against self-incrimination to those charged with felonies. It has never been suggested that a defendant charged with a misdemeanor could be compelled to testify against himself. To so argue would be both illogical and inconsistent. "[T] here can be no doubt that the Fifth Amendment privilege . . . serves to protect persons *in all settings* in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves." 384 U.S. at 467 (emphasis added). We hold that *Miranda* warnings must be given to *all* individuals prior to custodial interrogation, whether the offense investigated be a felony or a misdemeanor traffic offense.

Our reasoning here follows *Argersinger v. Hamlin*, 407 U.S. 25 (1972), which concerned the scope of the sixth amendment right to counsel. There the defendant faced potential incarceration for committing a misdemeanor. The Court held, "[a]bsent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." *Id.* at 37. The Court relied heavily on *Gideon v. Wainwright*, 372 U.S. 335 (1964), for the proposition that all defendants, including the indigent, are entitled to counsel. Although *Gideon* nor the sixth amendment right to counsel was limited to "serious" offenses. 407 U.S. at 30. We follow this same reasoning to extend the right to counsel to individuals charged with misdemeanors.

We recognize that the Fourth Circuit in *Clay v. Riddle*, 541 F. 2d 456 (4th Cir. 1976), declined to require *Miranda* warnings for misdemeanor traffic offenses. That court's decision seemed to turn on two factors. First, the court noted its awareness of language in *Miranda* that the *Miranda* decision was "not intended to hamper" the traditional investigative functions of the police. *Miranda*, 384

U.S. at 477, *quoted in Clay*, 541 F. 2d at 457. Second, the court emphasized that "the unlawful incident [in *Clay*] was a commonplace event — a traffic offense . . . ." *Id.* Neither of these factors convinces us that *Miranda* does not apply to traffic misdemeanors.

First, the traditional investigative police functions will not be hampered by requiring *Miranda* warnings prior to custodial interrogations in misdemeanor traffice offenses. "On-the-scene questioning," preserved by the *Miranda* Court, is likewise preserved today. To the extent that *Miranda* and its progeny permit non-custodial interrogations when a felony is investigated, our decision permits the same when a misdemeanor traffice offense is investigated. It is only when an individual "has been taken into custody or otherwise deprived of his freedom of action in any significant way," *Miranda*, 384 U.S. at 444, that warnings must be given before questioning begins. We do not hold that the mere stopping of a motor vehicle triggers *Miranda*. Because the police gather information in misdemeanor traffic offenses primarily through on-the-scene questioning, their freedom to investigate remains essentially unhampered.

Second, we attach no significance to the fact that traffic offenses are "commonplace" events. The privilege against self-incrimination is an enduring right, undiminished by the number of people who enjoy it or the frequency of its exercise. The mere fact that police officers may frequently have to advise individuals of their constitutional rights does not justify limiting these important procedural safeguards to felony cases. Furthermore, although traffic offenses may be commonplace, *custodial interrogations* stemming from misdemeanor traffic offenses are *rare*. For these reasons, we decline to adopt the Fourth Circuit's reasoning in *Clay* that *Miranda* warnings do not

apply to the present situtation because the offense is commonplace.

We believe that the facts of the present case require that Trooper Williams should have advised McCarty of his constitutional rights. At the point that Trooper Williams took McCarty to the police station, his "freedom of action [was] curtailed in [a] significant way." The failure to advise McCarty of his constitutional rights rendered at least some of his statements inadmissable. *Miranda.*

Because the petitioner was convicted on inadmissible evidence, we vacate his conviction. Accordingly, we remand the case to the district court for the issuance of a writ of habeas corpus, giving the State of Ohio ninety days in which to retry McCarty.

WELLFORD, Circuit Judge, dissenting. I agree with much of the majority opinion in this case. As I read the opinion, the majority finds that McCarty was not in custody until he was formally placed under arrest. During the original confrontation and investigation at the scene, McCarty was not significantly deprived of freedom of action, despite the stipulation that the officer knew that McCarty would be arrested as soon as he got out of his automobile. This comports with the language in *Miranda v. Arizona*, 384 U.S. 436, 477-78 (1966) stating:

> Our decision is not intended to hamper the traditional function of police officers in investigating crime. . . . General on-the-scene questioning as to facts surrounding a crime. . . is not affected by our holding. . . . In such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present.

Consequently, I agree that McCarty's statements made prior to formal arrest were made in a noncustodial situation and were therefore admissable. *See, U.S. v. LeQuire*, 424 F. 2d 341, 434-344 (5th Cir. 1970).

Even if a suspected traffic offender were deemed to be "in custody" or significantly "deprived of his freedom" by the investigating officer *at the scene* of an investigation for a misdemeanor offense, (and McCarty was here charged with a first degree misdemeanor under Ohio law), I would hold that any admission or confession made under such circumstances to be admissable without a *Miranda* warning. *See, Clay v. Riddle*, 541 F. 2d 456 (4th Cir. 1976).

I agree with the majority, however, that the later questioning after formal arrest at the police station was subject to *Miranda, supra*, since this was clearly a custodial situation. *Argersinger v. Hamlin*, 407 U.S. 25 (1972), holds that a defendant charged with a misdemeanor, even a traffic offense, must have counsel if he is to be sentenced to jail, but the right to counsel would not apply as a constitutional requirement if an offender were deprived of his automobile license or fined in a misdemeanor proceeding. Application of this rationale to admission of evidence without a *Miranda* warning in this "first degree misdemeanor" situation compels the conclusion that *Miranda* warnings are only required in a *clearly* custodial situation, as where a formal arrest is made. McCarty's confessions at the police station, therefore, if material, since they came after arrest and formal charges, would be inadmissible.

The later confessions, however, merely reiterate what McCarty had already admitted at the scene to the investigating officer. Failure to suppress what was essentially repetitious confession evidence, which should not have been admitted on the basis of failure to give *Miranda* warnings at the jail, was harmless error under the circumstances.

Chapman v. California, 386 U.S. 18 (1967). I would therefore affirm the district court's denial of habeas corpus relief.

Office - Supreme Court, U.S.
FILED
FEB 27 1984
ALEXANDER L. STEVAS
CLERK

NO. 83-710

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

HARRY J. BERKEMER, SHERIFF
OF FRANKLIN COUNTY, OHIO,
PETITIONER,

V.

RICHARD N. MCCARTY,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED OCTOBER 27, 1983
CERTIORARI GRANTED JANUARY 9, 1984

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State v. McCarty, No. 80AP-680, Franklin County, Ohio Court of Appeals, March 11, 1981, Journal Entry of Judgment	J. A. 4
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[1] At the suggestion of the Clerk, a typewritten facsimile of the Joint Exhibit has been included in the Joint Appendix.

The following documents of the Joint Appendix have been reproduced in the appendix to the Petition for Writ of Certiorari and are designated in the brief by reference (A).

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RELEVANT DOCKET ENTRIES

Petition for Writ of Habeas Corpus
Filed September 11, 1981
(Omitted from Appendix)

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Order, filed October 3, 1983, Staying Mandate (J. A. 16)

J. A. 2

State v. McCarty, No. 123,915, Franklin County Municipal Court, Joint Exhibit

CHEMICAL TEST DATA:

Specimen: ☐ Blood ☑ Breath ☐ Saliva ☐ Urine ☐ None ☐ Refused ☐ Unable	Analysis result: .00%
	If Breath, what instrument? Intoxilyzer
If refused, why?	

SUPPLEMENTAL TEST:

Advised of right to have additional test performed (Yes) No Witness U-

Was additional test performed? Yes No Unknown

INTERVIEW:

Were you operating a vehicle? Yes Where were you going? Home

What street or highway were you on? I-270 Direction of travel? EAST

Where did you start from? SR 161 What time did you start? I Don't Know

What time is it now? 01 30Am What city (county) are you in now? FRANKLIN County

What is the date? 28TH What day of the week is it? SUNDAY

INTERVIEWER TO FILL IN ACTUAL: 0225 (am)/pm MONDAY 3-31-86 TPC T. Williams
Time Day Date Interviewer's Name

When did you last eat? 8:00 Pm What did you eat? Chilli

What were you doing the last three hours? VISTING FRIENDS

Have you been drinking? Yes What? 2 Beers How much? 2-Beers

Where? MORSE RD Started? 11:30 am/pm Stopped? 11:30 am/pm

Are you under the influence of an alcoholic beverage now? I guess Barely What is your occupation? FORK LIFT OPERATOR

Have you ever been stopped for OMVI before? Yes

Do you have any physical defects? NO If so, what? —

Are you ill? NO If so, what's wrong? —

Do you limp? YES Have you been injured lately? YES If so, what's wrong? HURT my BACK

Did you get a bump on the head? Were you involved in an accident today?

Have you had any alcoholic beverage since the accident? NO If so, what? —

Where? — How much? — When? —

Have you seen a doctor or dentist lately? NO If so, who? — When? —

What for? — Are you taking tranquilizers, pills or medicines of any kind? NO

If so, what kind? (Get sample) — Last dose? am/pm Do you have epilepsy? NO

Diabetes? — Do you take insulin? — If so, last dose? — am/pm

Have you had any injections of any other drugs recently? NO If so, what for? —

What kind of drug? — Last dose? — am/pm When did you last sleep? 8:01 Pm

How much sleep did you have? Hour Are you wearing false teeth? NO Do you have a glass eye? NO

HANDWRITING SPECIMEN
Signature and/or anything he chooses. × Richard McCarty

SUPPLEMENTARY DATA: (Note - Get witnesses, including officers who observed, to prove driving)

WITNESSES			WAS SUSPECT DRIVING OR OPERATING	WHAT WAS HIS CONDITION	WHERE OBSERVED
Name	Address	Tel. No.			

Passengers in Suspect's Vehicle	Name	Address	Condition

REMARKS: Def STATED THAT HE HAD SMOKED TO joints AT AROUND 11:30 Pm No Male. Drugs or PCP in Vehicle at Time Richard McCarty

HP-90B

STATE OF OHIO

DEPARTMENT OF HIGHWAY SAFETY

Item 1: [x] Driver [ ] Pedestrian [ ] Passenger

Item 2: [x] Accident [ ] Violation [ ] Other

Date and time of Accident or Violation 3-31-90 0120 (am) pm

STATE HIGHWAY PATROL

ALCOHOLIC INFLUENCE REPORT

Case No.

Arrest No. V140153

Accident No.

Arresting Officer Tpr C J Williams

Date and time in custody 3-31-90 0120

Name Richard M McCarty Address 529 Ericksen Ave, Cabinet Res, Ohio

Age 27 Sex M Race White Approx. Wt. 5'08" Operator Lic. No. NT825526 State Ohio

OBSERVATIONS:

CLOTHES	Describe (Type & Color) Hat or Cap NONE Shoes BOOTS; Jacket or Coat BLK Heels 1/2"; Shirt or Dress MED ALOHA PRINT; Pants or Skirt BLUE JEANS Condition: [ ] Disorderly [ ] Disarranged [ ] Soiled [ ] Mussed [x] Orderly (Describe) GOOD
BREATH	Odor of Alcoholic Beverage: [ ] strong [ ] moderate [ ] faint [x] none
ATTITUDE	[ ] Excited [ ] Hilarious [ ] Talkative [ ] Carefree [x] Sleepy [ ] Profanity [ ] Combative [ ] Indifferent [ ] Insulting [ ] Cocky [ ] Cooperative [x] Polite
UNUSUAL ACTIONS	[ ] Hiccoughing [ ] Belching [ ] Vomiting [ ] Fighting [ ] Crying [ ] Laughing
SPEECH	[ ] Not Understandable [ ] Mumbled [x] Slurred [x] Mush Mouthed [ ] Confused [ ] Thick Tongued [ ] Stuttered [ ] Accent [ ] Fair [ ] Good

Indicate other unusual actions or statements, including when first observed: THE DEF HAD TO BE HELD UP FROM FALLING DOWN, USE THE DEF'S VEHICLE TO SUPPORT HIM

Signs or complaint of illness or injury: NONE

PERFORMANCE TESTS: (Note - See departmental instructions for conducting these tests)

Check squares if not made		Check appropriate square before word describing condition observed
[ ]	**BALANCE**	[x] Falling [ ] Needed Support [ ] Wobbling [ ] Swaying [ ] Unsure [ ] Sure
[x]	**WALKING**	[ ] Falling [ ] Staggering [ ] Stumbling [ ] Swaying [ ] Unsure [ ] Sure
[x]	**TURNING**	[ ] Falling [ ] Staggering [ ] Hesitant [ ] Swaying [ ] Unsure Sure
[x]	**FINGER-TO-NOSE**	Right: [ ] Completely Missed [ ] Hesitant [ ] Sure Left: [ ] Completely Missed [ ] Hesitant [ ] Sure
[x]	**COINS**	[ ] Unable [ ] Fumbling [ ] Slow [ ] Sure (Other) (Balance during coin test)

Ability to understand instructions: [ ] Poor [x] Fair [ ] Good

Tests performed: Date 3-31-90 Time 0132

ARRESTING OFFICER STATEMENTS OF FACT:

VEHICLE Note any defect that may have contributed to this violation:

Effects of alcohol: [ ] extreme [ ] obvious [ ] slight [x] none

Ability to drive: [x] unfit [ ] fit

Did you observe the defendant drive prior to the arrest? (Yes) No If not, identify person who did:

Indicate unusual actions or statement when first observed and what led you to suspect alcoholic influence. This statement may be produced in court if you testify as a witness, as required by the Ohio Rules of Criminal Procedure:

YOUR HONOR THIS UNIT WAS TRAVELING SOUTH ON I-270 AT MP 30 WHEN I FIRST OBSERVED THE DEF'S VEHICLE. THE DEF'S VEHICLE WAS OBSERVED WEAVING HIS LANE OF TRAVEL. THE DEF WAS FOLLOWED APPROX. 2 MILES BEFORE BEING STOPPED. AS THE DEF WAS STOPPED AND ASKED OUT OF THE CAR THE DEF NEEDED SUPPORT TO KEEP FROM FALLING. THE DEF STATED THAT HE HAD TWO BEERS AND ALSO SMOKED SEVERAL JOINTS OF MARIJUANA. THE DEF'S SPEECH WAS VERY SLURRED AND MUSH MOUTHED AND WAS VERY HARD TO UNDERSTAND. THE DEF WAS PLACE UNDER ARREST FOR OMVI AND TRANSPORTED TO THE FRANKLIN COUNTY S.O. FOR A BREATH TEST WHICH HE TESTED .000

Rev. 3-1-89

J. A. 3

State v. McCarty, No. 123,915, Franklin County Municipal Court, Joint Exhibit
[Typewritten Facsimile]

CHEMICAL TEST DATA:

Specimen: ☐ Blood ☒ Breath ☐ Saliva ☐ Urine ☐ None ☐ Refused ☐ Unable

Analysis result: .00%

If Breath, what instrument? Intoxilyzer

If refused, why? ---

SUPPLEMENTAL TEST:

Advised of right to have additional test performed (Yes) No Witness U- ---

Was additional test performed? Yes No Unknown ---

INTERVIEW:

Were you operating a vehicle? yes Where were you going? Home

What street or highway were you on? IS-270 Direction of travel? East

Where did you start from? SR 161 What time did you start? I don't know

What time is it now? 0130 A.M. What city (county) are you in now? Franklin County

What is the date? 28th What day of the week is it? Sunday

INTERVIEWER TO FILL IN ACTUAL: 0228 (am)pm Monday 3-31-80 Tpr C.J. Williams
Time Day Date Interviewer's Name

When did you last eat? 8:00 p.m. What did you eat? Chilli

What were you doing the last three hours? Visiting Friends

Have you been drinking? Yea What? 2-Beers How much? 2-Beers

Where? Morse Rd Started? 11:30 am/pm) Stopped? 11:30 am/pm

Are you under the influence of an alcoholic beverage now? I guess barely What is your occupation? Fork Lift Operator

Have you ever been stopped for OMVI before? Yes

Do you have any physical defects? No If so, what? ---

Are you ill? No If so, what's wrong? ---

Do you limp? Yes Have you been injured lately? Yes If so, what's wrong? Hurt my back

Did you get a bump on the head? Were you involved in an accident today?

Have you had any alcoholic beverage since the accident? No If so, what? ---

Where? --- How much? --- When? ---

Have you seen a doctor or dentist lately? No If so, who? --- When? ---

What for? --- Are you taking tranquilizers, pills or medicines of any kind? No

If so, what kind? (Get sample) --- Last dose? am/pm Do you have epilepsy? No

Diabetes? --- Do you take insulin? --- If so, last dose? --- am/pm

Have you had any injections of any other drugs recently? No If so, what for? ---

What kind of drug? --- Last dose? --- am/pm When did you last sleep? 8:00 p.m.

How much sleep did you have? Hour Are you wearing false teeth? No Do you have a glass eye? No

HANDWRITING SPECIMEN Signature and/or anything he chooses.	(Signature omitted)

SUPPLEMENTARY DATA: (Note - Get witnesses, including officers who observed, to prove driving)

WITNESSES Name	Address	Tel. No.	WAS SUSPECT DRIVING OR OPERATING	WHAT WAS HIS CONDITION	WHERE OBSERVED

Passengers in Suspect's Vehicle	Name	Address	Condition

REMARKS: Def stated that he had smoked to joints at around 11:30 p.m. No angle dust or PCP in the pot

(Signature omitted)

HP-91B

STATE OF OHIO

(Check) [X] Driver [ ] Pedestrian [ ] Passenger
(Check) [ ] Accident [X] Violation [ ] Other
Date and time of Accident or Violation 3-31-80 0120 (am) pm

STATE HIGHWAY PATROL

ALCOHOLIC INFLUENCE REPORT

DEPARTMENT OF HIGHWAY SAFETY

Case No.
Arrest No. V140183
Accident No.
Arresting Officer Tpr C.J. Williams
Date and time in custody 3-31-80 01:20

Name Richard N. McCarty Address 529 Erickson Ave. Columbus, Ohio
Age 27 Sex M Race White Approx. Wt. 5'08 Operator Lic. No. NL879590 State Ohio

OBSERVATIONS:

CLOTHES	Describe (Type & Color): Hat or Cap None; Shoes Boots; (Jacket) or Coat Brn; Heels 1/2"; (Shirt) or Dress Mar Alger Davidson; (Pants) or Skirt Blue Jeans
	Condition: [ ] Disorderly [ ] Disarranged [ ] Soiled [ ] Mussed [X] Orderly (Describe) Polite
BREATH	Odor of Alcoholic Beverage: [ ] strong [ ] moderate [ ] faint [X] none
ATTITUDE	[ ] Excited [ ] Hilarious [ ] Talkative [ ] Carefree [X] Sleepy [ ] Profanity [ ] Combative [ ] Indifferent [ ] Insulting [ ] Cocky [ ] Cooperative [X] Polite
UNUSUAL ACTIONS	[ ] Hiccoughing [ ] Belching [ ] Vomiting [ ] Fighting [ ] Crying [ ] Laughing
SPEECH	[ ] Not Understandable [ ] Mumbled [X] Slurred [X] Mush Mouthed [ ] Confused [ ] Thick Tongued [ ] Stuttered [ ] Accent [ ] Fair [ ] Good

Indicate other unusual actions or statements, including when first observed: The def had to be held up from falling down, use the def's vehicle to support him

Signs or complaint of illness or injury: none

PERFORMANCE TESTS: (Note - See departmental instructions for conducting these tests)

Check squares if not made		Check appropriate square before word describing condition observed
[ ]	BALANCE	[X] Falling [ ] Needed Support [ ] Wobbling [ ] Swaying [ ] Unsure [ ] Sure
[X]	WALKING	[ ] Falling [ ] Staggering [ ] Stumbling [ ] Swaying [ ] Unsure [ ] Sure
[X]	TURNING	[ ] Falling [ ] Staggering [ ] Hesitant [ ] Swaying [ ] Unsure Sure
[X]	FINGER-TO-NOSE	Right: [ ] Completely Missed [ ] Hesitant [ ] Sure
		Left: [ ] Completely Missed [ ] Hesitant [ ] Sure
[X]	COINS	[ ] Unable [ ] Fumbling [ ] Slow [ ] Sure (Other)
		(Balance during coin test)

Ability to understand instructions: [ ] Poor [X] Fair [ ] Good

Tests performed: Date 3-31-80 Time 0132

ARRESTING OFFICER STATEMENTS OF FACT:

VEHICLE Note any defect that may have contributed to this violation:

Effects of alcohol: [ ] extreme [ ] obvious [ ] slight [X] none

Ability to drive: [X] unfit [ ] fit

Did you observe the defendant drive prior to the arrest? (Yes) No If not, identify person who did:

Indicate unusual actions or statement when first observed and what led you to suspect alcoholic influence. This statement may be produced in court if you testify as a witness, as required by the Ohio Rules of Criminal Procedure:

Your Honor: This unit was traveling south on IS270 at MP 30 when I first observed the def's vehicle. The def's vehicle was observed weaving his lane of travel. The def was followed approx. 2 miles before being stopped. As the def. was stopped and asked out of the car the def needed support to keep from falling. The def stated that he had two beers and also smoked several joints of marjuna. The def's speech was very slurred and mushmouthed and was very hard to understand The def was place under arrest for O.M.V.I. and transported to the Franklin County S.O. for a breath test which he tested .000.

IN THE COURT OF APPEALS
OF FRANKLIN COUNTY, OHIO

No. 80AP-680
March 11, 1981

State of Ohio,
Plaintiff-Appellee,
v.
Richard N. McCarty,
Defendant-Appellant.

JOURNAL ENTRY OF JUDGMENT

For the reasons stated in the decision of this court rendered herein on March 10, 1981, the assignment of error is overruled, and it is the judgment and order of this Court that the judgment of the Franklin County Municipal Court is affirmed.

WHITESIDE, REILLY & NORRIS, JJ.

By /s/ Archer E. Reilly
Judge Archer E. Reilly

cc: David E. Tingley
R. William Meeks

J. A. 5

Filed July 1, 1981

THE SUPREME COURT OF OHIO

1981 TERM

THE STATE OF OHIO,
City of Columbus.

State of Ohio,	No. 81-710
Appellee,	MOTION FOR AN ORDER
vs.	DIRECTING THE COURT OF APPEALS
Richard N. McCarty,	for FRANKLIN County
Appellant.	TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

COSTS:
Motion Fee, $20.00, paid by R. William Meeks

[Clerk's Certificate Omitted]

J. A. 6

Filed July 1, 1981
THE SUPREME COURT OF OHIO
1981 TERM

THE STATE OF OHIO,
City of Columbus.

State of Ohio,
Appellee,
vs.
Richard N. McCarty,
Appellant.

No. 81-710
APPEAL FROM THE
COURT OF APPEALS
for Franklin County

This cause, here on appeal as of right from the Court of Appeals for Franklin County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Court of the Court of Appeals for Franklin County for entry.

[Clerk's Certificate Omitted]

J. A. 7

No. 82-3216

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

RICHARD McCARTY,
Petitioner-Appellant,

v.

CAPTAIN HERDMAN,
Respondent-Appellee.

ON APPEAL from the United States District Court for the Southern District of Ohio.

Decided and Filed September 6, 1983.

Before: KENNEDY, MARTIN, and WELLFORD, Circuit Judges.

MARTIN, Circuit Judge, delivered the opinion of the Court, in which KENNEDY, Circuit Judge, joined. WELLFORD, Circuit Judge, (pp.7-8) delivered a separate, dissenting opinion.

BOYCE F. MARTIN, Jr., Circuit Judge. This appeal presents the sole issue of whether law enforcement officers must give "*Miranda* warnings" to individuals in custody for misdemeanor traffic offenses. *See Miranda v. Arizona*, 384 U.S. 436 (1966).

Richard McCarty appeals the denial of his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The petitioner was convicted of operating a motor vehicle while under the influence of alcohol and/or drugs in violation of Ohio Revised Code § 4511.19, a first degree misdemeanor. Evidence supporting his conviction included

incriminating statements which he tried unsuccessfully to suppress. He was sentenced to ninety days in jail, eighty of which were suspended. The Franklin County, Ohio Court of Appeals affirmed the conviction and the Ohio Supreme Court refused to accept jurisdiction in this matter. The district court below denied habeas relief because in its judgment, one arrested for a misdemeanor traffic offense is not constitutionally entitled to *Miranda* warnings. *See, e.g., Clay v. Riddle*, 542 F. 2d 456 (4th Cir. 1976); and *Ohio v. Pyle*, 19 Ohio St. 2d 64 (1969). McCarty appeals from that decision.

The state trooper's arrest report and the parties' stipulations comprised all the facts before the trial judge. Ohio State Trooper Williams observed McCarty's car weaving in and out of its lane while travelling south on Interstate 270 on the evening of March 31, 1980. Trooper Williams stopped the car and asked McCarty to get out. He noticed that McCarty needed support to keep from falling as he exited the vehicle. "At this time Trooper Williams concluded that the defendant would be charged with a traffic offense and, therefore, his freedom to leave the scene terminated."[1] (Joint stipulation.)

---

[1] While the parties so stipulate, we do not feel bound by the subjective standard implied in the stipulation. *See* United States v. Harris, 611 F. 2d 170,172 (6th Cir. 1979).

In Lowe v. United States, 407 F. 2d 1391 (9th Cir. 1969), the court stated:

> It follows that *the time when* the officer's intent to arrest is formed has no bearing on the question of whether or not there exists "in custody" questioning. whether a person is in custody should not be determined by what the officer or the person being questioned thinks; there should be an objective standard. Although the officer may have an intent to make

McCarty had difficulty performing the field sobriety balancing test. While still at the scene of the arrest, he told Trooper Williams that he had recently consumed two beers and several joints of marijuana. McCarty's speech was very slurred and Trooper Williams had difficulty understanding him.

Trooper Williams placed McCarty under formal arrest and took him to the county jail for an intoxilyzer test. The test showed no alcohol in McCarty's system. At the jail, McCarty answered Trooper Williams' questions for the State Highway Patrol Alcohol Influence Report. McCarty responded that he was "barely" under the influence of alcohol. At Trooper Williams' request, McCarty wrote on the report that the marijuana he had smoked had not been treated with "PCP"or "angel dust." At no time, either before or after McCarty was taken into custody, did Trooper Williams advise him of his constitutional rights.

Before the trial judge, McCarty moved to exclude his statements to Trooper Williams. His motion was denied. He pleaded *nolo contendere* and was found guilty of driving while intoxicated.

---

an arrest, either formed prior to, or during the questioning, this is not a factor in determining whether there is present "in-custody" questioning. It is the officer's statements and acts, the surrounding circumstances, gauged by a "reasonable man" test, which are determinative.

Id. at 1397; *accord*, United States v. Booth, 669 F. 2d 1231, 1235 (9th Cir. 1981). *See also* Oregon v. Mathiason, 429 U.S. 492, 495 (1977).

[1] Habeas relief after a guilty plea is permissible. *See* Lefkowitz v. Newsome, 420 U.S. 283 (1975) (Justices White, Powell, Burger, and Rehnquist dissenting.)

McCarty argued consistently, at both state and federal levels [3] that *Miranda v. Arizona* requires law enforcement officers to advise all persons taken into custody of their constitutional rights to counsel and to remain silent. Because he was not so advised when arrested for drunken driving, he maintains that the statements he made while in police custody cannot support his conviction. We agree.

In *Miranda*, the Supreme Court held that an individual in police custody may not be interrogated until and unless he is first advised that he has the right to remain silent; that anything he says may be used against him; that he had the right to an attorney; and that an attorney will be appointed for him if he cannot retain one. These warnings are an "absolute prerequisite to interrogation," said the court, 384 U.S. at 467, and without the warnings, the fruits of a custodial interrogation are inadmissible at trial.

> To summarize, we hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege. . . But unless and until such warnings are demonstrated . . . , no evidence obtained as a result of interrogation can be used against him.

384 U.S. at 478-479 (footnote omitted).

Miranda, then, creates procedural safeguards to secure the fifth amendment privilege against self-incrimination. Although felony offenses were specifically in issue in *Miranda* and its companion cases, the language of the opinion does not limit the safeguards to individuals suspected of felonies. Similarly, yet more importantly, the language of the fifth amendment does not limit the privilege

against self-incrimination to those charged with felonies. It has never been suggested that a defendant charged with a misdemeanor could be compelled to testify against himself. To so argue would be both illogical and inconsistent. "[T]here can be no doubt that the Fifth Amendment privilege . . . serves to protect persons *in all settings* in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves." 384 U.S. at 467 (emphasis added). We hold that *Miranda* warnings must be given to *all* individuals prior to custodial interrogation, whether the offense investigated be a felony or a misdemeanor traffic offense.

Our reasoning here follows *Argersinger v. Hamlin*, 407 U.S. 25 (1972), which concerned the scope of the sixth amendment right to counsel. There the defendant faced potential incarceration for committing a misdemeanor. The Court held, "[a]bsent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." *Id.* at 37. The Court relied heavily on *Gideon v. Wainwright*, 372 U.S. 335 (1964), for the proposition that all defendants, including the indigent, are entitled to counsel. Although *Gideon* involved a felony offense, the Court noted neither *Gideon* nor the sixth amendment right to counsel was limited to "serious" offenses. 407 U.S. at 30. We follow this same reasoning to extend the right to counsel to individuals charged with misdemeanors.

We recognize that the Fourth Circuit in *Clay v. Riddle*, 541 F. 2d 456 (4th Cir. 1976), declined to require *Miranda* warnings for misdemeanor traffic offenses. That court's decision seemed to turn on two factors. First, the court noted its awareness of language in *Miranda* that the *Miranda* decision was "not intended to hamper" the traditional investigative functions of the police. *Miranda*, 384

U.S. at 477, *quoted in Clay*, 541 F. 2d at 457. Second, the court emphasized that "the unlawful incident [in *Clay*] was a commonplace event — a traffic offense . . . ." *Id.* Neither of these factors convinces us that *Miranda* does not apply to traffic misdemeanors.

First, the traditional investigative police functions will not be hampered by requiring *Miranda* warnings prior to custodial interrogations in misdemeanor traffice offenses. "On-the-scene questioning," preserved by the *Miranda* Court, is likewise preserved today. To the extent that *Miranda* and its progeny permit non-custodial interrogations when a felony is investigated, our decision permits the same when a misdemeanor traffice offense is investigated. It is only when an individual "has been taken into custody or otherwise deprived of his freedom of action in any significant way," *Miranda*, 384 U.S. at 444, that warnings must be given before questioning begins. We do not hold that the mere stopping of a motor vehicle triggers *Miranda*. Because the police gather information in misdemeanor traffic offenses primarily through on-the-scene questioning, their freedom to investigate remains essentially unhampered.

Second, we attach no significance to the fact that traffic offenses are "commonplace" events. The privilege against self-incrimination is an enduring right, undiminished by the number of people who enjoy it or the frequency of its exercise. The mere fact that police officers may frequently have to advise individuals of their constitutional rights does not justify limiting these important procedural safeguards to felony cases. Furthermore, although traffic offenses may be commonplace, *custodial interrogations* stemming from misdemeanor traffic offenses are *rare*. For these reasons, we decline to adopt the Fourth Circuit's reasoning in *Clay* that *Miranda* warnings do not

apply to the present situtation because the offense is commonplace.

We believe that the facts of the present case require that Trooper Williams should have advised McCarty of his constitutional rights. At the point that Trooper Williams took McCarty to the police station, his "freedom of action [was] curtailed in [a] significant way." The failure to advise McCarty of his constitutional rights rendered at least some of his statements inadmissable. *Miranda.*

Because the petitioner was convicted on inadmissible evidence, we vacate his conviction. Accordingly, we remand the case to the district court for the issuance of a writ of habeas corpus, giving the State of Ohio ninety days in which to retry McCarty.

WELLFORD, Circuit Judge, dissenting. I agree with much of the majority opinion in this case. As I read the opinion, the majority finds that McCarty was not in custody until he was formally placed under arrest. During the original confrontation and investigation at the scene, McCarty was not significantly deprived of freedom of action, despite the stipulation that the officer knew that McCarty would be arrested as soon as he got out of his automobile. This comports with the language in *Miranda v. Arizona*, 384 U.S. 436, 477-78 (1966) stating:

> Our decision is not intended to hamper the traditional function of police officers in investigating crime. . . . General on-the-scene questioning as to facts surrounding a crime. . . is not affected by our holding. . . . In such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present.

Consequently, I agree that McCarty's statements made prior to formal arrest were made in a noncustodial situation and were therefore admissable. *See, U.S. v. LeQuire*, 424 F. 2d 341, 343-344 (5th Cir. 1970).

Even if a suspected traffic offender were deemed to be "in custody" or significantly "deprived of his freedom" by the investigating officer *at the scene* of an investigation for a misdemeanor offense, (and McCarty was here charged with a first degree misdemeanor under Ohio law), I would hold that any admission or confession made under such circumstances to be admissable without a *Miranda* warning. *See, Clay v. Riddle*, 541 F. 2d 456 (4th Cir. 1976).

I agree with the majority, however, that the later questioning after formal arrest at the police station was subject to *Miranda, supra*, since this was clearly a custodial situation. *Argersinger v. Hamlin*, 407 U.S. 25 (1972), holds that a defendant charged with a misdemeanor, even a traffic offense, must have counsel if he is to be sentenced to jail, but the right to counsel would not apply as a constitutional requirement if an offender were deprived of his automobile license or fined in a misdemeanor proceeding. Application of this rationale to admission of evidence without a *Miranda* warning in this "first degree misdemeanor" situation compels the conclusion that *Miranda* warnings are only required in a *clearly* custodial situation, as where a formal arrest is made. McCarty's confessions at the police station, therefore, if material, since they came after arrest and formal charges, would be inadmissible.

The later confessions, however, merely reiterate what McCarty had already admitted at the scene to the investigating officer. Failure to suppress what was essentially repetitious confession evidence, which should not have been admitted on the basis of failure to give *Miranda* warnings at the jail, was harmless error under the circumstances.

Chapman v. California, 386 U.S. 18 (1967). I would therefore affirm the district court's denial of habeas corpus relief.

J. A. 16

Filed October 3, 1983
Clerk's Stamp Deleted

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
NO. 82-3216

RICHARD McCARTY,

Petitioner-Appellant,

vs.

HARRY J. BERKEMER, SHERIFF,

Respondent-Appellee

ORDER STAYING MANDATE

ORDERED, That motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date; provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

ENTERED BY ORDER OF THE COURT
/s/JOHN P. HEHMAN, CLERK

CERTIFICATE OF SERVICE

Pursuant to Rule 28.5 (b) of the Rules of the Supreme Court, I hereby certify that the requisite number of copies (3) of the foregoing Joint Appendix have been served upon respondent, Richard N. McCarty, by personal service of such copies to the office of respondent's counsel of record, R. William Meeks, 503 South High Street, Columbus, Ohio, 43215, by delivery to counsel for respondent, or to an employee thereof, this____day of February, 1984.

I further certify that all parties required to be served have been served. The respondent's name is Richard N. McCarty, and his address is 529 Erickson, Columbus, Ohio 43213.

_____

ALAN C. TRAVIS
Counsel of Record
for Petitioner

Office - Supreme Court, U.S.
FILED
DEC 14 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-710

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HARRY J. BERKEMER, SHERIFF
OF FRANKLIN COUNTY, OHIO,
Petitioner,

v.

RICHARD N. McCARTY,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Cassidy and Meeks

Joel A. Rosenfeld
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Attorneys for Respondent

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus, Ohio 43216

THE QUESTION PRESENTED FOR REVIEW

Respondent is not satisfied with Petitioner's question presented for review. The following question is more properly brought to this Court for review:

> Whether the principles announced in *Miranda v. Arizona, 384 U.S. 436* and *Argersinger v. Hamlin, 407 U.S. 25* require that law enforcement officers provide "Miranda warnings" prior to engaging in custodial interrogation of individuals arrested for traffic misdemeanors.

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No. 83-710

IN THE

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OCTOBER TERM, 1983

HARRY J. BERKEMER, SHERIFF
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Franklin County Court of Appeals is set forth at page A-9 of the Appendix. The opinion of the United States District Court for the Southern District of Ohio, Eastern Division, is set forth at page A-17 of the Appendix. The opinion of the United States Court of Appeals for the Sixth Circuit is set forth at page A-21 of the Appendix.

JURISDICTION

Respondent accepts Petitioner's statement of jurisdiction, but urges that this Court in exercising its judicial discretion deny the writ.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides in pertinent part:

> "[no person]. . . shall be compelled in any criminal case to be a witness against himself,. . ."

The Sixth Amendment of the United States Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

STATE STATUTES INVOLVED

Ohio Revised Code Section 4511.19, Driving While Intoxicated

"No person who is under the influence of alcohol or any drug of abuse, or the combined influence of alcohol and any drug of abuse shall operate any vehicle, streetcar, or trackless trolley within this State."

Ohio Revised Code Section 4511.99, Penalties

(A) "Whoever violates Section 4511.19 of the Revised Code is guilty of a misdemeanor of the first degree, in addition to the license suspension or revocation provided in Section 4507.16 of the Revised Code, at least three (3) days imprisonment is mandatory under this division."

Ohio Revised Code Section 2929.21, Penalties for Misdemeanor

(A) "Whoever is convicted of, or pleads guilty to a misdemeanor, other than a minor misdemeanor, shall be imprisoned for a definite term or fined, or both, which term of imprisonment and fine shall be fixed by the Court as provided in this section."

(B) "Terms for imprisonment for misdemeanors shall be imposed as follows:

(1) For a misdemeanor of the first degree, not more than six (6) months: . . ."

STATEMENT OF THE CASE

Respondent is satisfied with Petitioner's statement of the case.

ARGUMENT

Respondent asserts that the Petition for Writ of Certiorari should be denied. Petitioner contends that because of conflicting decisions on the issue of providing *Miranda* warnings for traffic misdemeanants that certiorari should be granted. A closer look at this contention and the judicial opinions in apparent conflict with the Sixth Circuit decision in *McCarty v. Berkemer*, render the inescapable conclusion that *Clay v. Riddle, 541 F. 2d 456 C.A. 4 (1976)* and *State v. Pyle, 19 Ohio St. 2d 64 (1969)* incorrectly applied the doctrine of *Miranda v. Arizona, 384 U.S. 436 (1966).*

The decisions in *Pyle* and *Riddle, supra*, focused on the type of offense involved - traffic misdemeanors. Both decisions suggested that *Miranda v. Arizona, supra,* was not intended to protect the Fifth Amendment rights of those arrested for misdemeanor offenses. In short, both *Pyle* and *Clay, supra*, reached their respective decisions by focusing on the type of offense that gave rise to police questioning, while ignoring the critical issue of nature of interrogation. Interestingly, in each case, dissenting justices accurately articulated the application of *Miranda's* principles by focusing on whether questioning was custodial or non-custodial and noting further that no language can be found in *Miranda* that excludes misdemeanants from its protection.

In *McCarty v. Berkemer,* the Sixth Circuit properly interpreted the holding of *Miranda v. Arizona, supra,* by concentrating on the type of interrogation conducted, rather than offense severity. The Sixth Circuit properly followed the mandate of this Court as set forth seventeen (17) years ago in *Miranda v. Arizona:*

> "Our holding will be spelled out with some specificity in the pages which follow but briefly stated it is

this: the prosecution may not use statements, whether exculpatory or inculpatory, stemming from *custodial interrogation* of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. *By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." (Miranda v. Arizona, at 444)* (emphasis added)

Additionally, the Sixth Circuit properly interpreted and applied this Court's decision in *Argersinger v. Hamlin, 407 U.S. 25 (1972)*, which pertained to the scope of a defendant's Sixth Amendment right to counsel. Indeed, the combined logic of *Miranda* and *Argersinger, supra*, lead inescapably to the conclusion that individuals arrested for traffic misdemeanors must be advised of "Miranda warnings" prior to custodial interrogation.

The Respondent asserts in conclusion that *State v. Pyle* and *Clay v. Riddle, supra*, were wrongly decided without proper regard to the controlling language of this Court in *Miranda v. Arizona, supra*. Therefore, the Petition for Writ of Certiorari should be denied.

CONCLUSION

The determination of whether or not to grant the Petition for Writ of Certiorari rests within the sound discretion of this Court. Although no one factor is controlling, Petitioners contend that a conflict of decisional case law exists on this issue.

Respondent submits that any existing conflict with the Sixth Circuit's decision in *McCarty v. Berkemer* is a product of erroneous interpretations of this Court's holding in *Miranda v. Arizona, supra.* This Court has unambiguously held that the nature of interrogation determines whether the privilege against self-incrimination applies and the Sixth Circuit has accurately followed that precedent.

Respondent asserts that this Court should not grant the Petition for Writ of Certiorari where wrongly decided cases create the appearance of case law inconsistency. Accordingly, this Court is urged to exercise its judicial discretion and deny the Petition for Writ of Certiorari.

R. William Meeks
Counsel of Record
503 South High Street
Columbus, Ohio 43215
Telephone (614) 228-3569
Attorney for Respondent

CERTIFICATE OF SERVICE

This is to certify that three copies of the foregoing Brief of Respondent in Opposition to Petition for Writ of Certiorari were mailed to Stephen Michael Miller, Prosecuting Attorney, Attorney for Petitioner, 369 South High Street, Columbus, Ohio 43215, by regular United States Mail, this 12th day of December, 1983.

R. WILLIAM MEEKS
Attorney for Respondent

APPENDIX A

IN THE FRANKLIN COUNTY MUNICIPAL COURT
COLUMBUS, OHIO

STATE OF OHIO,	:	
Plaintiff,	:	
vs.	:	Case No. 123915 (1980)
RICHARD N. McCARTY,	:	
Defendant.	:	

STIPULATION

The following stipulation is entered into by defense counsel, R. William Meeks, and Assistant City Prosecutor, James Sika. The purpose of this stipulation is to dispense with the necessity of an evidentiary hearing in open court, since there is agreement concerning the essential facts giving rise to this constitutional issue and the particular legal issues to be presented on appeal stemming from the Court's overruling of the Defendent's Motion to Suppress Custodial Statements.

Had there been an evidentiary hearing, the defense would have called as a witness Trooper C.J. Williams of the Ohio State Highway Patrol. His stipulated testimony is as follows: On March 31, 1980, Trooper Williams, while on his regularly assigned duty, observed the Defendant's vehicle traveling south on Interstate 270 at milepost 30. Trooper Williams observed the Defendant's vehicle weaving in and out of its expected lane of travel. Trooper Williams followed the Defendant's vehicle for approximately two miles, at which time it was stopped and the Defendant was asked to exit the car. Trooper Williams observed that the Defendant needed support to keep himself from falling as he got out of his vehicle.

At this time, Trooper Williams concluded that the Defendant would be charged with a traffic offense and, therefore, his freedom to leave the scene was terminated. The Defendant was then asked to perform the field sobriety test, designated as the "balance test," and according to Trooper Williams, he was "falling." While still at the scene of the arrest, Trooper Williams questioned the Defendant concerning his use of intoxicants and the Defendant replied that he had consumed two beers and had smoked several joints of marijuana a short time before. While questioning the Defendant, Trooper Williams noticed that the Defendant's speech was very slurred and mush-mouthed and it was very hard to understand him. The Defendant was then formally placed under arrest for operating a vehicle while under the influence of alcohol and taken to the Franklin County Jail for an intoxilyzer test to determine the percentage of alcohol present in the Defendant's system. The result of the test was .000.

While at the Franklin County Jail, Trooper Williams continued to question the Defendant in order to fill out the information sought by the State Highway Patrol Alcohol Influence Report. (A copy of the completed Alcohol Influence Report is admitted as a joint exhibit and is formally made a part of the stipulation herein.) While questioning the Defendant concerning information contemplated by the Alcohol Influence Report, Trooper Williams asked the Defendant if he had been drinking, to which the Defendant responded in the affirmative. Trooper Williams asked the Defendant if he were under the influence of alcohol, to which the Defendant repsonded, "I guess, barely." Trooper Williams asked the Defendant if the marijuana he admitted smoking had been treated with another chemical and requested the Defendant to write out his response. As indicated on the Alcohol Influence Report form under the section designated "Remarks,"

the Defendant responded in writing "no angle [sic] dust or PCP in the pot. Rick McCarty."

It is further stipulated between the parties that Trooper Williams did not advise the Defendant of his constitutionally protected rights, announced in *Miranda v. Arizona*, prior to questioning the Defendant either at the scene of the arrest or later in custody at the Franklin County Jail.

/s/Golden, Sep 16 1980
SIDNEY H. GOLDEN, JUDGE

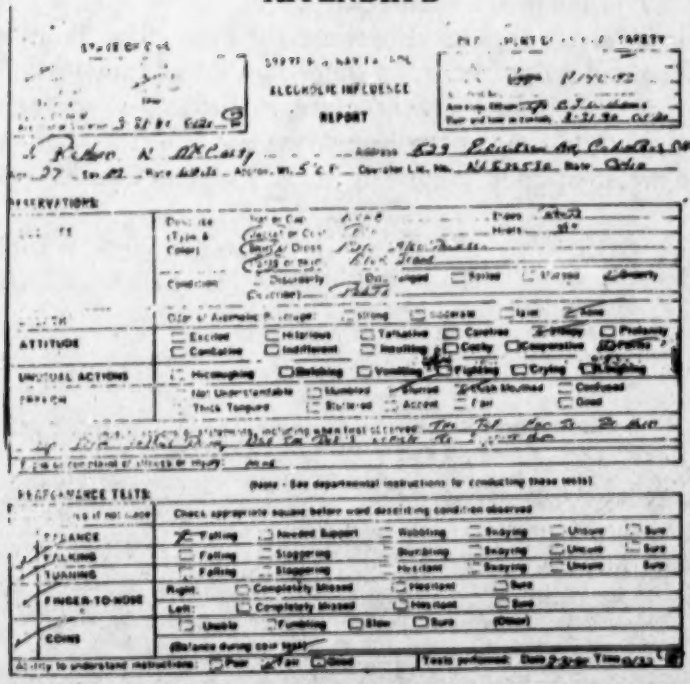
Approved:

/s/R, William Meeks
R. WILLIAM MEEKS (MEE02)
Attorney for Defendant
24 North High Street
Columbus, Ohio 43215
614 228-3569

/s/W. James Sika
W. JAMES SIKA (SIK01)
Assistant City Prosecutor
375 South High Street
Columbus, Ohio 43215
614 222-8904

A-4

APPENDIX B



ALCOHOLIC INFLUENCE

REPORT

OBSERVATIONS

ATTITUDE

UNUSUAL ACTIONS

SPEECH

PERFORMANCE TESTS

(Note - See departmental instructions for conducting these tests)

BALANCE

WALKING

TURNING

FINGER-TO-NOSE

COINS

ARRESTING OFFICER STATEMENTS OF FACT:

VEHICLE

CHEMICAL TEST DATA:

Specimen: ☐ Blood ☐ Breath ☐ Saliva ☐ Urine ☐ None
☐ Refused ☐ Unable

Analysis result: .0[illegible]
If Breath, what instrument? Intoxilyzer

If refused, why? ———

SUPPLEMENTAL TEST:

Advised of right to have additional test performed: (Yes) No Witness: U-

Was additional test performed? Yes No Unknown

INTERVIEW:

Were you operating a vehicle? Yes Where were you going? Home

What street or highway were you on? I-10 EBC Direction of travel? East

Where did you start from? SR 761 What time did you start? I don't know

What time is it now? 01:30a What city (county) are you in now? Pinal County

What is the date? 2nd What day of the week is it? Sunday

INTERVIEWER TO FILL IN ACTUAL: 0130 Hrs Time Sunday Day 2 Jan 72 Date [illegible] Interviewer's Name

When did you last eat? 8:00 Pm What did you eat? Food

What were you doing the last three hours? Visiting Friends

Have you been drinking? Yes What? 2 Beers How much? 2-Beers

Where? Mobile Bar Started? 8:30 Stopped? 9:30

Are you under the influence of an alcoholic beverage now? 2 beers Exactly What's your occupation? Free Lifestyles

Have you ever been stopped for DWI before? ———

Do you have any physical defects? No If so, what? ———

Are you sick? No If so, what's wrong? ———

Do you limp? Yes Have you been injured lately? Yes If so, what's wrong? Hurt my back

Did you get a bump on the head? ——— Were you involved in an accident today? ———

Have you had any alcoholic beverage since the accident? No If so, what? ———

Where? ——— How much? ——— When? ———

Have you seen a doctor or dentist lately? No If so, what? ——— When? ———

What for? ——— Are you taking tranquilizers, pills or medicines of any kind? Asp.

If so, a full host? (Get sample) ——— Last dose? ——— am/pm Do you have epilepsy? No

Diabetes? ——— Do you take insulin? ——— If so, last dose? ——— am/pm

Have you had any injections of any other drugs recently? No If so, what for? ———

What kind of drug? ——— Last dose? ——— am/pm When did you last sleep? 8:00 Pm

How much sleep did you have? None Are you wearing false teeth? No Do you have a glass eye? No

HANDWRITING SPECIMEN
Spell or write anything he chooses. Richard McGaha

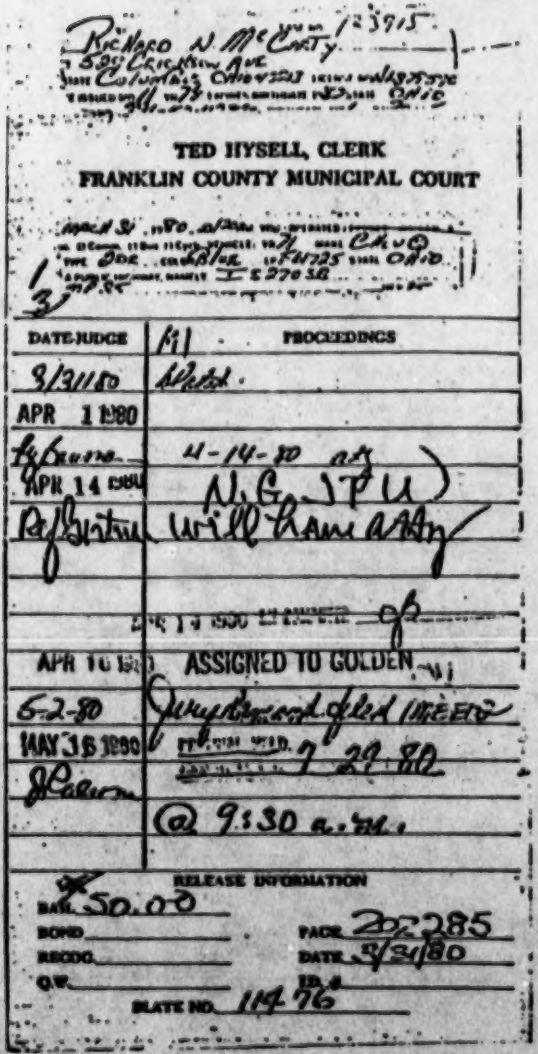
SUPPLEMENTARY DATA: (Note - Get witnesses, including officers who observed, to prove driving)

WITNESS Name	Address	Tel. No.	Did witness observe driving or operation?	What did he observe?	Name and address

Name	Address	Telephone

REVERSE: Pt states I had it on Seven Up and Miller Ng Night Driver or DCP in lieu of Rum Bloody

APPENDIX C



Richard N. McCarty 123915
529 Crichton Ave
Columbus, Ohio 43223

TED HYSELL, CLERK
FRANKLIN COUNTY MUNICIPAL COURT

CHVD
FH725 OHIO
I 5270 58

DATE-JUDGE	PROCEEDINGS
3/31/80	Filed.
APR 1 1980	
[illegible]	4-14-80 atty
APR 14 1980	N.G. JPU
[illegible]	Will have Atty
	APR 14 1980 11 A.M. OK
APR 16 1980	ASSIGNED TO GOLDEN
6-2-80	Jury Demand filed (illegible)
MAY 16 1980	PRETRIAL HELD 7-29-80
JCalvert	
	@ 9:30 a.m.

RELEASE INFORMATION

BAIL $50.00
BOND
RECOG
O.W.
PAGE 20-285
DATE 3/31/80
ID #
PLATE NO. 11476

V140183

RICHARD N. McCARTY 123915

DATE-JUDGE	PROCEEDINGS
JUL 29 1980	Plea of Not Guilty entered
Gelbke	Jury Waived - R/A
	P.C. 9/4 9:00 AM.
July 31, 1980	Motion to suppress statements filed
August 18, 1980	Motion to suppress specifically overruled upon authority of
Gelbke	State v. Cyle 17 OS 2d 64 (1969)
8-11-80	R/A Comm 9/4 9 AM Rem to 9/15 10 AM Rem
SEP 15 1980	EFFECT OF PLEAS, RIGHT TO APPEAL, RIGHT TO COUNSEL PER CRIM. R. 44 EXPLAINED TO DEFENDANT BY COURT. (ATTORNEY) (COURT APPOINTED) BOARD. PLEA OF GUILTY NO CONT.
Gelbke	Finding of Guilty
	See next Page for
	Sentence

V140183

Richard N. McCarty

529 Lexington Ave

Columbus, Ohio

DOB 3-6-53 4285

DATE-JUDGE	PROCEEDINGS
SEP 15 1980	Sentence:
Golden	90 days CJ.
	$300.00 + Costs
	drs - 6 months
	Suspend 90 days last CJ
	sentence. (days to serve
	4 days in AID Progr.)
	+ def to serve 6 days
	in CJ.
	Suspend $100.00 pltf
	fine
	able to pay.
	9/26 fine by 3 days CJ.
	10/3 fine by 3 days CJ.
	10/31 fine by 4 days
	4 days ($200.00) + Costs.
9-16-80 NOTICE OF APPEAL FILED	
STIPULATION FILED WITH ATTACHED JOINT	
EXHIBIT- ENTRY STAYING EXECUTION OF	
SENTENCE PENDING OUTCOME OF APPEAL,	
GOLDEN - 10-24-80 FOR ALL PAPERS TO	
COURT OF APPEALS	

APPENDIX D

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

No. 80AP-680

State of Ohio,
Plaintiff-Appellee,
v.
Richard N. McCarty,
Defendant-Appellant.

DECISION

Rendered March 10, 1981

MR. GREGORY S. LASHUTKA, City Attorney,
MR. RONALD J. O'BRIEN, City Prosecutor,
MR. DAVID E. TINGLEY, Assistant,
375 South High Street,
Columbus, Ohio 43215
For Plaintiff-Appellee.

MR. R. WILLIAM MEEKS,
503 South High Street,
Columbus, Ohio 43215,
For Defendant-Appellant.

REILLY, J.

This is an appeal from a judgment of the Franklin County Municipal Court.

Appellant has perfected this appeal, including one assignment of error:

"The Trial Court erred by overruling Appellant's Motion to Suppress Statements following his arrest for driving a motor vehicle under the influence of drugs where such statements were taken in violation of the Appellant's right against self-incrimination

and right to counsel, thereby violating the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 16 of the Ohio Constitution."

The record shows that Appellant was charged with violating R.C. 4511.19, a first degree misdemeanor, when the arresting officer determined that he was operating a motor vehicle under the influence of drugs "marijuana".

Appellant moved to suppress evidence of certain statements he made to the officer. The court overruled the motion. Appellant pled no contest and was found guilty as charged.

Counsel entered the following stipulation, which was signed by the trial judge:

"Had there been an evidentiary hearing, the defense would have called as witness Trooper C.J. Williams of the Ohio State Highway Patrol. His stipulated testimony is as follows: On March 31, 1980, Trooper Williams, while on his regularly assigned duty, observed the Defendant's vehicle traveling south on Interstate 270 at milepost 30. Trooper Williams observed the Defendant's vehicle weaving in and out of its expected lane of travel. Trooper Williams followed the Defendant's vehicle for approximately two miles, at which time it was stopped and the Defendant was asked to exit the car. Trooper Williams observed that the Defendant needed support to keep himself from falling as he got out of his vehicle.

"At this time Trooper Williams concluded that the Defendant would be charged with a traffic offense and, therefore, his freedom to leave the scene was terminated. The Defendant was then asked to perform the field sobriety test, designated as the 'balance

test,' and according to Trooper Williams, he was 'falling.' While still at the scene of the arrest, Trooper Williams questioned the Defendant concerning his use of intoxicants and the Defendant replied that he had consumed two beers and had also smoked several joints of marijuana a short time before. While questioning Defendant, Trooper Williams noticed that the Defendant's speech was very slurred and mush-mouthed and it was hard to understand him. The Defendant was then formally placed under arrest for operating a motor vehicle while under the influence of alcohol and taken to the Franklin County Jail for an intoxilyzer test to determine the percentage of alcohol present in the Defendant's system. The result of the test was .000.

"While at the Franklin County Jail, Trooper Williams continued to question the Defendant in order to fill out the information sought by the State Highway Patrol Alcohol Influence Report. (A copy of the completed Alcohol Influence Report is admitted as a joint exhibit and is formally made a part of the stipulation herein.) While questioning the Defendant concerning information contemplated by the Alcohol Influence Report, Trooper Williams asked the Defendant if he had been drinking, to which the Defendant responded in the affirmative. Trooper Williams asked the Defendant if he were under the influence of alcohol, to which the Defendant responded 'I guess, barely.' Trooper Williams asked the Defendant if the marijuana he admitted smoking had been treated with another chemical and requested the Defendant to write out his response. As indicated on the Alcohol Influence Report form under

the section designated 'Remarks,' the Defendant responded in writing 'no angle [sic] dust or PCP in the pot. Richard McCarty.'

"It is further stipulated between the parties that Trooper Williams did not advise the Defendant of his constitutionally protected rights, announced in *Miranda v. Arizona*, prior to questioning the Defendant either at the scene of the arrest or later in custody at the Franklin County Jail."

The crux of this case is whether the *Miranda* rights concerning the custodial interrogation of an accused, extends to misdemeanor cases. The Supreme Court held in *State v. Pyle*, (1969), 19 Ohio St. 2d 64, in paragraph one and two of the syllabus:

"1. In Ohio, a misdemeanor or a minor offense is a crime for which a person may not be imprisoned in the penitentiary, and may not be imprisoned for more than one year. (Section 1.05 and 1.06, Revised Code, construed and applied.)

"2. The holding of *Miranda v. Arizona*, 384 U.S. 436, is not applicable to misdemeanors, as presently defined in Ohio."

Further, this Court wrote in the unreported decision *State v. Winkfield*, No. 72AP-346, Franklin County Court of Appeals, rendered on July 24, 1973 (1973 Decisons, page 2150 at 2154-2155) as follows:

"The Ohio Supreme Court has held in *State v. Pyle*, (1969), 19 Ohio St. 2d 64, syllabus paragraph 2, that *Miranda v. Arizona*, (1965) 384 U.S. 436, is not applicable to misdemeanors. The court amplified the syllabus at page 67 of the decision as follows:

" 'It is a fact so well known that judicial notice can be taken that the investigative procedures ordinarily

followed with respect to misdemeanors by law enforcement officers differ markedly from the investigative procedures ordinarily followed with respect to felonies. No law enforcement agency possesses the physical facilities, or the manpower, to investigate and interrogate each person suspected of a misdemeanor to the degree and extent accorded each person suspected of a felony. Nor is there usually any necessity for concentrated investigation or interrogation. In the great majority of misdemeanor cases (traffic offenses). the offense has taken place in the presence of the arresting officer. Nearly all interrogation occurs, as in the instant case, at or near the scene of the infraction, not in any coercive atmosphere created by the law enforcement authorities.'

"Hence, *Argersinger, supra*, by extending the right of counsel at trial, does not extend to misdemeanor in-custodial interrogations within the Sixth Amendment right of counsel. * * *"

Whereupon, for the foregoing reasons, appellant's assignment of error is not well taken and is overruled. Accordingly, the judgment of the Franklin County Municipal Court is affirmed.

Judgment affirmed.

WHITESIDE and NORRIS, J.J. concur.

APPENDIX E

IN THE COURT OF APPEALS
OF FRANKLIN COUNTY, OHIO

No. 80AP-680
March 13, 1983

State of Ohio,
Plaintiff-Appellee,
v.
Richard N. McCarty,
Defendant-Appellant.

JOURNAL ENTRY OF JUDGMENT

For the reasons stated in the decision of this court rendered herein on March 10, 1981, the assignment of error is overruled, and it is the judgment and order of this Court that the judgment of the Franklin County Municipal Court is affirmed.

WHITESIDE, REILLY & NORRIS, JJ.

By /s/ Archer E. Reilly
Judge Archer E. Reilly

cc: David E. Tingley
R. William Meeks

APPENDIX F

JUL 2 198

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,
City of Columbus.

State of Ohio,
Appellee,
vs.
Richard N. McCarty,
Appellant.

19 81 TERM
To wit: July 1, 1981

No. 81-710

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS

for FRANKLIN County

TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $30.00, paid by R. William Meeks

I, Thomas L. Startsman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ..... day of ..... 19.....

..... Clerk

..... Deputy

JUL 2 1981

SC-18A 75-3-1500 Baker Business, Publishers, Systems, Ohio

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,
City of Columbus.

19 81 *TERM*

To wit: July 1, 1981

State of Ohio,
Appellee,
vs.
Richard N. McCarty,
Appellant.

No. 81-710

APPEAL FROM THE COURT OF APPEALS

for FRANKLIN *County*

This cause, here on appeal as of right from the Court of Appeals for FRANKLIN *County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.*

FOR YOUR INFORMATION
NOT [illegible]LIC

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for FRANKLIN *County for entry.*

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ..... day of ..... 19.....

Clerk

Deputy

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION
December 11, 1981

RICHARD N. McCARTY
Petitioner

vs. Civil Action C-2-81-1118

CAPTAIN HERDMAN
Respondent

OPINION AND ORDER

Petitioner brings this action for a writ of habeas corpus under 28 U.S.C. § 2254. This matter is before the Court on the petition, return of writ, and the briefs and exhibits of the parties.

At trial, he pleaded no contest on a stipulated record and on September 15, 1980 petitioner was convicted of operating a motor vehicle while under the influence of drugs in violation of § 4511.19, Ohio Revised Code. The trial judge sentenced him to ninety (90) days incarceration in the Franklin County Jail which was suspended.

Petitioner appealed his conviction to the Court of Appeals for Franklin County which affirmed the trial court judgment. Thereafeter, he attempted an appeal from the Court of Appeals to the Supreme Court of Ohio, and that court overruled his motion for leave to appeal.

Petitioner alleges that he is deprived of liberty in violation of the Constitution of the United States in that:

(1) His conviction was obtained in violation of his constitutional rights to counsel and against self-incrimination because the police obtained

> incriminating admissions from him during custodial questioning without first providing his *Miranda* warnings.

He contends that law enforcement officers must give the *Miranda* [*Miranda v. Arizona*, 384 U.S. 436 (1966)] warnings to an arrestee prior to a custodial interrogation following an arrest for a misdemeanor traffic offense. The parties have stipulated that petitioner was not informed of his *Miranda* rights prior to in custody questioning by Trooper Williams, the arresting officer.

The United States Supreme Court has not considered whether *Miranda v. Arizona*, *supra*, applies in cases involving traffic offenses or other misdemeanors. *Lewis v. New Jersey*, 414 U.S. 905 (1979) (White J., dissenting). The Supreme Court of Ohio has held that *Miranda* does not apply to misdemeanor cases, *State v. Pyle*, 19 Ohio St. 2d 64, 249 N.E. 2d 826 (1969) *cert. denied*, 396 U.S. 1007, and the prevailing view is that *Miranda* does not apply to traffic offenses. *Clay v. Riddle*, 541 F. 2d 456 (4th Cir. 1976); *State v. Neal*, 476 S.W. 2d 547 (Mo. 1972); *State v. Bliss*, 238 A. 2d 848 (Del. 1968); *Copler v. Greenville*, 207 So. 2d 339 (Miss. 1969) *cert. denied*, 392 U.S. 941; *State v. Macuk*, 268 A. 2d 1 (N.J. 1970). *See also*, *State v. Gabrielson*, 192 N.W. 2d 792 (Iowa 1969). *But see*, *State v. Lawson*, 204 S.E. 2d 843 (N.D. 1974); *State v. Darnell*, 508 P. 2d 613 (Wash. 1973), *cert. denied*, 414 U.S. 1112; *Campbell v. Superior Court*, 479 P. 2d 685 (Ariz. 1971). *Contra*, *State v. Fields*, 294 N.W. 2d 404 (N. D. S. Ct. 1980); *State v. Lawson*, 204 S.E. 2d 843 (N.C. S. Ct. 1974).

In *Clay v. Riddle*, 541 F. 2d at 457, the United States Court of Appeals for the Fourth Circuit stated:

> . . . [I]t is noteworthy that the unlawful incident was a commonplace event—a traffic offense— a

> breach of the law to which we believe the Supreme Court's decision does not extend. This circumstance alone—not that the misconduct was a misdemeanor as to which *Miranda* has been said to be inopposite—is the basis of our present holding that *Miranda* warnings were not required. . .

The Court finds the reasoning of the Court of Appeals to be persuasive; and accordingly, the Court HOLDS that *Miranda* warnings do not have to be given prior to in custody interrogation of a suspect arrested for a traffic offense.

WHEREUPON, the Court FURTHER HOLDS that the petition is without merit; and, therefore, it is DENIED.

This action is hereby DISMISSED. The Clerk of Court shall enter JUDGMENT for respondent.

/s/ Joseph P. Kinneary
United States District Judge

APPENDIX H

UNITED STATES DISTRICT COURT
FOR
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Richard N. McCarty

v Case No. C-281-1118

Captain Herdman

JUDGMENT

This action came on for consideration before the Court, The Honorable Joseph P. Kinneary, United States District Judge, presiding. The issues having been duly considered and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED THAT: the petition is without merit and is denied. Action is dismissed. Judgment is for the respondent.

Dated at Columbus, Ohio this 11th day of December, 1981.

JOHN D. LYTER, CLERK

By:/s/
Deputy Clerk

APPENDIX I

No. 82-3216

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

RICHARD McCARTY,
Petitioner-Appellant,

v.

CAPTAIN HERDMAN,
Respondent-Appellee.

ON APPEAL from the United States District Court for the Southern District of Ohio.

Decided and Filed September 6, 1983.

Before: KENNEDY, MARTIN, and WELLFORD, Circuit Judges.

MARTIN, Circuit Judge, delivered the opinion of the Court, in which KENNEDY, Circuit Judge, joined. WELLFORD, Circuit Judge, (pp.7-8) delivered a separate, dissenting opinion.

BOYCE F. MARTIN, Jr., Circuit Judge. This appeal presents the sole issue of whether law enforcement officers must give "*Miranda* warnings" to individuals in custody for misdemeanor traffic offenses. *See Miranda v. Arizona*, 384 U.S. 436 (1966).

Richard McCarty appeals the denial of his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The petitioner was convicted of operating a motor vehicle while under the influence of alcohol and/or drugs in violation of Ohio Revised Code § 4511.19, a first degree

misdemeanor. Evidence supporting his conviction included incriminating statements which he tried unsuccessfully to suppress. He was sentenced to ninety days in jail, eighty of which were suspended. The Miami County Court of Appeals reversed but the Ohio Supreme Court reinstated the conviction. The district court below denied habeas relief because in its judgment, one arrested for a misdemeanor traffic offense is not constitutionally entitled to *Miranda* warnings. *See, e.g., Clay v. Riddle*, 542 F. 2d 456 (4th Cir. 1976); and *Ohio v. Pyle*, 19 Ohio St. 2d 64 (1969). McCarty appeals from that decision.

The state trooper's arrest report and the parties' stipulation comprised all the facts before the trial judge. Ohio State Trooper Williams observed McCarty's car weaving in and out of its lane while traveling south on Interstate 270 on the evening of March 31, 1980. Trooper Williams stopped the car and asked McCarty to get out. He noticed that McCarty needed support to keep from falling as he exited the vehicle. "At this time Trooper Williams concluded that the defendant would be charged with a traffic offense and, therefore, his freedom to leave the scene was terminated."[1] (Joint stipulation.)

---

[1] While the parties so stipulate, we do feel bound by the subjective standards implied in the stipulation. *See* United States v. Harris, 611 F. 2d 170,172 (6th Cir. 1979). In Lowe v. United States, 407 F. 2d 1391 (9th Cir. 1969), the court stated:

> It follows that *the time when* the officer's intent to arrest is formed has no bearing on the question of whether or not there exists "in custody" questioning. whether a person is in custody should not be determined by what the officer or the person being questioned thinks; there should be an objective standard. Although the officer may have an intent to make

McCarty had difficulty performing the field sobriety balancing test. While still at the scene of the arrest, he told Trooper Williams that he had recently consumed two beers and several joints of marijuana. McCarty's speech was very slurred and Trooper Williams had difficulty understanding him.

Trooper Williams placed McCarty under formal arrest and took him to the county jail for an intoxilyzer test. The test showed no alcohol in McCarty's system. At the jail, McCarty answered Trooper Williams' questions for the State Highway Patrol Alcohol Influence Report. McCarty responded that he was "barely" under the influence of alcohol. At Trooper Williams' request, McCarty wrote on the report that the marijuana he had smoked had not been treated with "PCP"or "angel dust." At no time, either before or after McCarty was taken into custody, did Trooper Williams advise him of his constitutional rights.

Before the trial judge, McCarty moved to exclude his statements to Trooper Williams. His motion was denied. He pleaded *nolo contendere* and was found guilty of driving while intoxicated.

---

an arrest, either formed prior to, or during the questioning, this is not a factor in determining whether there is present "in-custody" questioning. It is the officer's statements and acts, the surrounding circumstances, gauged by a "reasonable man" test, which are determinative.

Id. at 1397; *accord*, United States 1. Booth, 669 F. 2d 1231, 1235 (9th Cir. 1981). *See also* Oregon v. Mathiason, 429 U.S. 492, 495 (1977).

[3] Habeas relief after a guilty plea is permissible. *See* Lefkowitz v. Newsome, 420 U.S. 283 (1975) (Justices White, Powell, Burger, and Rehnquist dissenting.)

McCarty argued consistently, at both state and federal levels [2] that *Miranda v. Arizona* required law enforcement officers to advise all persons taken into custody of their constitutional rights to counsel and to remain silent. Because he was not so advised when arrested for drunken driving, he maintains that the statements he made while in police custody cannot support his conviction. We agree.

In *Miranda*, the Supreme Court held that an individual in police custody may not be interrogated until and unless he is first advised that he has the right to remain silent; that anything he says may be used against him; that he had the right to an attorney; and that an attorney will be appointed for him if he cannot retain one. These warnings are an "absolute prerequisite to interrogation," said the court, 384 U.S. at 467, and without the warnings, the fruits of a custodial interrogation are inadmissible at trial.

> To summarize, we hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege. . . . But unless and until such warnings are demonstrated . . . , no evidence obtained as a result of interrogation can be used against him.

384 U.S. at 478-479 (footnote omitted).

Miranda, then, creates procedural safeguards to secure the fifth amendment privilege against self-incrimination. Although felony offenses were specifically in issue in *Miranda* and its companion cases, the language of the opinion does not limit the safeguards to individuals suspected of felonies. Similarly, yet more importantly, the language of the fifth amendment does not limit the privilege

against self-incrimination to those charged with felonies. It has never been suggested that a defendant charged with a misdemeanor could be compelled to testify against himself. To so argue would be both illogical and inconsistent. "[T]here can be no doubt that the Fifth Amendment privilege . . . serves to protect persons *in all settings* in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves." 384 U.S. at 467 (emphasis added). We hold that *Miranda* warnings must be given to *all* individuals prior to custodial interrogation, whether the offense investigated be a felony or a misdemeanor traffic offense.

Our reasoning here follows *Argersinger v. Hamlin*, 407 U.S. 25 (1972), which concerned the scope of the sixth amendment right to counsel. There the defendant faced potential incarceration for committing a misdemeanor. The Court held, "[a]bsent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." *Id.* at 37. The Court relied heavily on *Gideon v. Wainwright*, 372 U.S. 335 (1964), for the proposition that all defendants, including the indigent, are entitled to counsel. Although *Gideon* nor the sixth amendment right to counsel was limited to "serious" offenses. 407 U.S. at 30. We follow this same reasoning to extend the right to counsel to individuals charged with misdemeanors.

We recognize that the Fourth Circuit in *Clay v. Riddle*, 541 F. 2d 456 (4th Cir. 1976), declined to require *Miranda* warnings for misdemeanor traffic offenses. That court's decision seemed to turn on two factors. First, the court noted its awareness of language in *Miranda* that the *Miranda* decision was "not intended to hamper" the traditional investigative functions of the police. *Miranda*, 384

U.S. at 477, *quoted in Clay*, 541 F. 2d at 457. Second, the court emphasized that "the unlawful incident [in *Clay*] was a commonplace event — a traffic offense . . . ." *Id.* Neither of these factors convinces us that *Miranda* does not apply to traffic misdemeanors.

First, the traditional investigative police functions will not be hampered by requiring *Miranda* warnings prior to custodial interrogations in misdemeanor traffice offenses. "On-the-scene questioning," preserved by the *Miranda* Court, is likewise preserved today. To the extent that *Miranda* and its progeny permit non-custodial interrogations when a felony is investigated, our decision permits the same when a misdemeanor traffice offense is investigated. It is only when an individual "has been taken into custody or otherwise deprived of his freedom of action in any significant way," *Miranda*, 384 U.S. at 444, that warnings must be given before questioning begins. We do not hold that the mere stopping of a motor vehicle triggers *Miranda*. Because the police gather information in misdemeanor traffic offenses primarily through on-the-scene questioning, their freedom to investigate remains essentially unhampered.

Second, we attach no significance to the fact that traffic offenses are "commonplace" events. The privilege against self-incrimination is an enduring right, undiminished by the number of people who enjoy it or the frequency of its exercise. The mere fact that police officers may frequently have to advise individuals of their constitutional rights does not justify limiting these important procedural safeguards to felony cases. Furthermore, although traffic offenses may be commonplace, *custodial interrogations* stemming from misdemeanor traffic offenses are *rare*. For these reasons, we decline to adopt the Fourth Circuit's reasoning in *Clay* that *Miranda* warnings do not

apply to the present situtation because the offense is commonplace.

We believe that the facts of the present case require that Trooper Williams should have advised McCarty of his constitutional rights. At the point that Trooper Williams took McCarty to the police station, his "freedom of action [was] curtailed in [a] significant way." The failure to advise McCarty of his constitutional rights rendered at least some of his statements inadmissable. *Miranda.*

Because the petitioner was convicted on inadmissible evidence, we vacate his conviction. Accordingly, we remand the case to the district court for the issuance of a writ of habeas corpus, giving the State of Ohio ninety days in which to retry McCarty.

WELLFORD, Circuit Judge, dissenting. I agree with much of the majority opinion in this case. As I read the opinion, the majority finds that McCarty was not in custody until he was formally placed under arrest. During the original confrontation and investigation at the scene, McCarty was not significantly deprived of freedom of action, despite the stipulation that the officer knew that McCarty would be arrested as soon as he got out of his automobile. This comports with the language in *Miranda v. Arizona*, 384 U.S. 436, 477-78 (1966) stating:

> Our decision is not intended to hamper the traditional function of police officers in investigating crime. . . . General on-the-scene questioning as to facts surrounding a crime. . . is not affected by our holding. . . . In such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present.

Consequently, I agree that McCarty's statements made prior to formal arrest were made in a noncustodial situation and were therefore admissable. *See, U.S. v. LeQuire*, 424 F. 2d 341, 434-344 (5th Cir. 1970).

Even if a suspected traffic offender were deemed to be "in custody" or significantly "deprived of his freedom" by the investigating officer *at the scene* of an investigation for a misdemeanor offense, (and McCarty was here charged with a first degree misdemeanor under Ohio law), I would hold that any admission or confession made under such circumstances to be admissable without a *Miranda* warning. *See, Clay v. Riddle*, 541 F. 2d 456 (4th Cir. 1976).

I agree with the majority, however, that the later questioning after formal arrest at the police station was subject to *Miranda, supra*, since this was clearly a custodial situation. *Argersinger v. Hamlin*, 407 U.S. 25 (1972), holds that a defendant charged with a misdemeanor, even a traffic offense, must have counsel if he is to be sentenced to jail, but the right to counsel would not apply as a constitutional requirement if an offender were deprived of his automobile license or fined in a misdemeanor proceeding. Application of this rationale to admission of evidence without a *Miranda* warning in this "first degree misdemeanor" situation compels the conclusion that *Miranda* warnings are only required in a *clearly* custodial situation, as where a formal arrest is made. McCarty's confessions at the police station, therefore, if material, since they came after arrest and formal charges, would be inadmissible.

The later confessions, however, merely reiterate what McCarty had already admitted at the scene to the investigating officer. Failure to suppress what was essentially repetitious confession evidence, which should not have been admitted on the basis of failure to give *Miranda* warnings at the jail, was harmless error under the circumstances.

Chapman v. California, 386 U.S. 18 (1967). I would therefore affirm the district court's denial of habeas corpus relief.

Office - Supreme Court, U.S.
FILED
FEB 27 1984
ALEXANDER L. STEVAS,

No. 83-710

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HARRY J. BERKEMER, SHERIFF
OF FRANKLIN COUNTY, OHIO,
Petitioner,

v.

RICHARD N. MCCARTY,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF PETITIONER

STEPHEN MICHAEL MILLER
Prosecuting Attorney of
Franklin County, Ohio

ALAN C. TRAVIS
Counsel of Record

Assistant Prosecuting Attorney
Hall of Justice
369 South High Street
Columbus, Ohio 43215
614/462-3555

Counsel for Petitioner

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus, Ohio 43216

QUESTION PRESENTED

WHETHER LAW ENFORCEMENT OFFICERS MUST GIVE "*MIRANDA* WARNINGS" TO INDIVIDUALS ARRESTED FOR MISDEMEANOR TRAFFIC OFFENSES. (*MIRANDA* V. *ARIZONA*, 384 U.S. 436 (1966).)

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No. 83-710

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HARRY J. BERKEMER, SHERIFF
OF FRANKLIN COUNTY, OHIO,
Petitioner,

v.

RICHARD N. MCCARTY,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF PETITIONER

OPINIONS BELOW

The decision of The United States Court of Appeals for the Sixth Circuit is now reported as *McCarty* v. *Herdman*, 716 F. 2d 361 (6th Cir., 1983) and is set out in the joint ap-

pendix at JA 7.[1] The decision of the United States District Court for the Southern District of Ohio, Eastern Division, is unreported and is set out in the appendix to the petition at A-10.[2]

JURISDICTION

The panel decision of The United States Court of Appeals for the Sixth Circuit was entered on September 6, 1983. Jurisdiction is conferred by 28 U.S.C. Section 1254(1).

The petition for writ of certiorari was filed on October 27, 1983. Certiorari was granted by order of January 9, 1984.

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[1] References to the appendix to the petition for writ of certiorari are designated as "A", while references to the joint appendix are designated as "JA".

[2] Due to the death of Captain Herdman, respondent-appellee below, Harry J. Berkemer, petitioner herein, was substituted as a party pursuant to Rule 43(C), Federal Rules of Appellate Procedure.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Ohio Revised Code (Page's) Section 4511.02
Compliance with order of police officer (Eff. 10-19-78)

> (A) No person shall fail to comply with any lawful order or direction of any police officer in-

vested with authority to direct, control, or regulate traffic.

(B) No person shall operate a motor vehicle so as to willfully elude or flee a police officer after receiving a visible or audible signal from a police officer to bring his motor vehicle to a stop.

Ohio Revised Code (Page's) Section 4511.19
Driving While Intoxicated (Eff. 1-1-75)

No person who is under the influence of alcohol or any drug of abuse, or the combined influence of alcohol and any drug of abuse shall operate any vehicle, streetcar, or trackless trolley within this state.

(Full text set forth in Appendix, *infra.*, at page 28.)

Ohio Revised Code (Page's) Section 4511.191
Implied Consent (Eff. 10-25-78)

(A) Any person who operates a motor vehicle upon the public highways in this state shall be deemed to have given consent to a chemical test or tests of his blood, breath, or urine for the purpose of determining the alcoholic content of his blood if arrested for the offense of driving while under the influence of alcohol. The test or tests shall be administered at the direction of a police officer having reasonable grounds to believe the person to have been driving a motor vehicle upon the public highways in this state while under the influence of alcohol.

(Full text set forth in Appendix, *infra.*, at page 30.)

Ohio Revised Code (Page's) Section 4511.99
Penalties (Eff. 3-15-79)

(A) Whoever violates Section 4511.19 of the Revised Code is guilty of a misdemeanor of the first degree, in addition to the license suspension or revocation provided in Section 4507.16 of the Revised Code. At least three days' imprisonment is mandatory under this division.

Ohio Revised Code (Page's) Section 2929.21
Penalties for Misdemeanor (Eff. 8-30-78)

(A) Whoever is convicted of or pleads guilty to a misdemeanor other than a minor misdemeanor shall be imprisoned for a definite term or fined, or both, which term of imprisonment and fine shall be fixed by the court as provided in this section.

(B) Terms for imprisonment for misdemeanors shall be imposed as follows:

(1) For a misdemeanor of the first degree, not more than six months....

(C) Fines for midemeanors shall be imposed as follows:

(1) For a misdemeanor of the first degree, not more than one thousand dollars....

STATEMENT OF THE CASE

On March 31, 1980, Ohio State Highway Patrol Trooper C.J. Williams observed respondent McCarty's vehicle traveling southbound on Interstate Highway 270. McCarty's vehicle was weaving in and out of the expected lane of travel. Williams followed the car for some two miles then stopped the vehicle and asked McCarty to exit the car. Williams observed that McCarty needed support to keep from falling. (Stipulation of Fact, A-1.) Williams concluded that McCarty would be charged with a traffic offense and proceeded to have McCarty attempt to perform a field sobriety test.[1] Williams described McCarty as "falling" during this time. The parties stipulated that "While still at the scene of the arrest, Trooper Williams questioned the [respondent] concerning his use of intoxicants and the [respondent] replied that he had consumed two beers and had smoked several joints of marijuana a short time before." (Stipulation, A-2.) Williams then formally placed McCarty under arrest for the traffic offense of operating a motor vehicle while under the influence of alcohol or drugs. McCarty was transported to the Franklin County Jail where under the state's implied consent law, he was asked to take an intoxilyzer test. The test indicated that no alcohol was present in McCarty's blood system.

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[1] In view of the express stipulation of the parties, dictum of the court below to the effect "...that [respondent] was not in custody until he was formally placed under arrest." (JA 13), is clearly without factual foundation. The parties have always agreed that respondent was "in custody" under any rational interpretation of that term. As the parties so stipulated, no reasonable person would have felt at liberty to leave the scene. The question before this Court is whether such is the *type* of custody encompassed by the *Miranda* decision.

Thereafter, Williams began to fill out an alcohol influence report. That report (JA 2) was made a part of the stipulation of fact before the municipal court judge hearing McCarty's traffic case. Included, *inter alia*, in the report were the observations of McCarty's physical appearance and condition, the observed facts of the offense and arrest and whether McCarty had been injured, was ill or diabetic. In response to Trooper Williams' inquiry, McCarty reiterated his statement made earlier at the highway scene, that he had consumed two beers. McCarty added that the marijuana he had smoked did not contain any "angle (sic) dust" or "PCP". McCarty also responded that he guessed he was "barely" under the influence of alcohol. (Stipulation, A-2, 3.) At no time was McCarty advised of his "*Miranda* rights".

Prior to trial of the traffic offense, McCarty unsuccessfully moved to suppress all statements given to Trooper Williams urging that they were obtained in violation of the rules announced by this Court in *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

On September 15, 1980, respondent McCarty was found guilty of the traffic offense of operating a motor vehicle while under the influence of alcohol or drugs. McCarty was sentenced to ninety days in jail. Eighty days were suspended. McCarty was ordered to spend four days in an alcohol and substance abuse program and six days in the county jail. McCarty was also fined three hundred dollars, one hundred of which was suspended. McCarty appealed unsuccessfully to the Court of Appeals for Franklin County, Ohio, and to the Supreme Court of Ohio, in each instance raising the issue of admissibility of his statements to the arresting officer. The Court of Appeals for Franklin County affirmed the conviction on March 10, 1981. Further review was denied by the Supreme Court of Ohio on July 1, 1981.

On September 11, 1981, McCarty filed a petition for a writ of habeas corpus in the United States District Court for

the Southern District of Ohio, Eastern Division, alleging deprivation of his constitutional rights by the admission of his statements to the arresting officer. On December 11, 1981, the district court denied the petition finding that the "*Miranda* warnings" do not have to be given prior to questioning a person arrested for a traffic offense. In doing so, the district court adopted the reasoning of the United States Court of Appeals for the Fourth Circuit in *Clay* v. *Riddle*, 541 F. 2d 456 (4th Cir., 1976). McCarty appealed from the decision and order of the district court to the United States Court of Appeals for the Sixth Circuit. On September 6, 1983, a divided panel of the circuit court reversed the judgment of the district court.

The majority rejected the analysis of *Clay* v. *Riddle*, *supra.*, and held that an impaired driver who is taken into custody must be given the *Miranda* warnings prior to questioning by a police officer. In dissent, Judge Wellford held that statements made *at the scene* of a highway safety arrest were outside the strictures of the *Miranda* decision and thereby admissible.[4] (JA 14) *Accord., Clay* v. *Riddle, supra.*

On January 9, 1984, this Court granted a writ of certiorari to resolve the question of whether law enforcement officers must give "*Miranda* warnings" to indiviuals arrested for highway safety offenses such as driving under the influence of intoxicants.

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[4] Judge Wellford went on to hold that statements later made by respondent at the police station should have been suppressed. However, he further noted that these subsequent declarations were simply a reiteration of the earlier statements and therefore clearly subject to the harmless error doctrine fashioned in *Chapman* v. *California*, 386 U.S. 18 (1967).

SUMMARY OF ARGUMENT

I. "*Miranda* warnings" (*Miranda* v. *Arizona*, 384 U.S. 436 (1966)) are not required to be given to an individual stopped for a brief period of time for investigation of suspicious behavior. A brief stop (authorized by *Terry* v. *Ohio*, 392 U.S. 1 (1968)) whether to investigate a suspected felony or for enforcement of highway safety laws, does not equate the formal, custodial interrogation contemplated by the *Miranda* decision. As the usual purpose of a *Terry* stop is to gain further information, a requirement that the law enforcement officer preceed his inquiries with "*Miranda* warnings" would defeat the purpose of the interview. Such requirement would seriously hamper the traditional function of police officers investigating crime, a position disavowed in the *Miranda* decision. See *Miranda*, *supra.*, 384 U.S. at 477-478.

"*Miranda* warnings" should not be applied to the stopping of a motorist suspected of violating a highway safety law as none of the practices deemed coercive by the *Miranda* decision are present in a traffic safety stop. On-the-scene questioning of a motorist stopped upon reasonable suspicion of driving while intoxicated is not the form of custodial interrogation envisioned by the *Miranda* decision. To require warnings under such circumstances would seriously impair a state's ability to provide for safe highways.

None of the standard tests which have been employed by the courts to determine the issue of custody is workable in the context of highway safety law enforcement. Subjective intent hinges on the repudiated "focus" of investigation standard. The objective or reasonable man test is unworkable in highway safety enforcement as no reasonable person would feel free to ignore a traffic officer's visible and audible signal to stop a vehicle; nor would any individual feel at liberty to leave the scene when ordered by a police of-

ficer to exit a vehicle. The use of formal arrest as a standard is undesirable, predicating admissibility of the suspect's statements on the traffic officer's decision of when to utter formal words. Such test merely serves to escalate form over substance as police officers can thereby conduct interrogations by delaying the rote incantation of *Miranda* warnings.

The dissenting opinion of Judge Wellford, below, correctly asserts that admission or confessions of a suspected traffic law violator, made at the scene of the investigation of a traffic offense, should be admissible without prior *Miranda* warnings. Adoption of the rule in cases of traffic safety law enforcement would clarify an important area of law currently decided in varying ways in various jurisdictions. The rule would provide a categorical rather than *ad hoc* basis for determination of the issue and provide a clear guideline for the courts and a workable rule for law enforcement officials engaged in highway safety law enforcement.

II. A state may validly require a person who is suspected of operating a motor vehicle on state highways while intoxicated, to submit to a reasonable test of the person's blood-alcohol content. Neither the test, nor inquiries of the arrested suspect regarding the test are proscribed by the Fifth Amendment or the prophylactic requirements of the *Miranda* decision.

Brief inquiries of a person arrested and in custody for drunken driving are not in the nature of those techniques of custodial interrogation deemed to be coercive by the *Miranda* Court. As the perceived need for protections against coercive police practices thought to exist in *Miranda* are not present during brief custodial inquiries of arrestees charged with highway safety violations, the Court should not apply the rigid prophylactic rule of *Miranda* to routine highway safety arrests.

III. Should the Court deem it necessary and advisable to apply the rationale and result of the *Miranda* decision to questioning following formal arrest and ensuing conveyance to a facility wherein a test for intoxication can be held, the Court should reverse the judgment below by applying the doctrine of harmless error.

ARGUMENT

WHETHER LAW ENFORCEMENT OFFICERS MUST GIVE "*MIRANDA* WARNINGS" TO INDIVIDUALS ARRESTED FOR MISDEMEANOR TRAFFIC OFFENSES. (*MIRANDA* V. *ARIZONA*, 384 U.S. 436 (1966).

I. The Traffic Stop

In *Miranda* v. *Arizona*, 384 U.S. 436 (1966), this Court announced procedural safeguards to ensure that a person arrested and taken to a police stationhouse would be informed of his Fifth Amendment right to remain silent in the face of police investigative interrogations. In so ruling, the Court addressed what was perceived to be the inherently coercive nature of lengthy, incommunicado police station interrogations designed to elicit confessions or other admissions. The Court reasoned the advice of the right to remain silent was necessary to dispel that coercive atmosphere and enable the arrestee to make a free and rational choice whether or not to speak.

The arrestee's perception that interrogation would continue indefinitely was a significant factor to the *Miranda* Court. Amplifying its concern, the Court reasoned that the warning of the right to remain silent was necessary to overcome "...an interrogator's imprications, whether implied or expressly stated, that the interrogation would continue until a confession is obtained...." (384 U.S. at 468.) The *Miranda* decision further held that a knowing, intelligent and voluntary waiver of the presence of counsel was another protective device necessary to counter coercive police practices in incommunicado interrogation and thereby secure Fifth Amendment values.

Custodial interrogation, the key premise of the *Miranda* decision, was extended from the stationhouse to the prison in *Mathis* v. *United States*, 391 U.S. 1 (1968) and to non-institutional settings in *Orozco* v. *Texas*, 394 U.S. 324 (1969). However, the exception for on-the-scene investigatory questioning carved out in *Miranda* (384 U.S. at 477) has not been diminished by later decisions of this Court. Custody within the context of *Miranda* and its progeny, means formal arrest or restraint of freedom to the degree associated with formal arrest. *California* v. *Beheler*, ____U.S.____(1983), 103 S. Ct. 3517; *Oregon* v. *Mathiason*, 429 U.S. 492 (1977). Custody, for purposes of analysis under *Miranda*, cannot be equated to that type of custody which is inherent to highway safety arrests.

> "Our decision is not intended to hamper the traditional function of police officers in investigating crime. [Citation omitted.] .... General on-the-scene questioning of citizens in the fact finding process is not affected by our holding."
> *Miranda, supra.*, 384 U.S. at 477.

This position is consistent with those decisions wherein the Court has permitted law enforcement officers, acting on reasonable suspicion that a crime has been or is about to be committed, to forcibly stop and temporarily detain an individual for the purpose of pursuing a limited course of investigation to confirm or dispel the officer's suspicions. e.g. *Terry* v. *Ohio*, 392 U.S. 1 (1968); *Adams* v. *Williams*, 407 U.S. 143, 146 (1972). See *United States* v. *Place*, ____U.S. ____(1983), 77 L. Ed. 2d 110, 103 S. Ct. 2637; *Pennsylvania* v. *Mimms*, 434 U.S. 106 (1977). Of course, the stop must be based upon articulable reasons, not mere inarticulate hunch. Compare *Delaware* v. *Prouse*, 440 U.S. 648 (1979). To require that *Miranda* warnings be given before asking ques-

tions which accompany a lawful *Terry* stop would defeat the very purpose of that legitimate, minimal intrusion. Such analysis and ensuing result is equally compelling in settings involving highway safety arrests.

This Court has recognized that an investigative stop is examined in terms of "the importance of the governmental interest at stake, the minimal intrusion of a brief stop, and the absence of practical alternatives." *United States* v. *Brignoni-Ponce*, 422 U.S. 873 at 881 (1975). Quoting from *Terry* v. *Ohio, supra.*, 392 U.S. at 29, the Court noted that "...the stop and inquiry must be 'reasonably related in scope to the justification for their initiation.'" *Ibid.*, 422 U.S. at 881. A state has a compelling interest in highway safety. *Mackey* v. *Montrym*, 443 U.S. 1 at 17-18 (1979). As has been observed, "The slaughter on the highways of this Nation exceeds the death toll of all our wars." *Perez* v. *Campbell*, 402 U.S. 637, 657 (1971) (Blackmun, J., concurring). Traffic control officers must be allowed to stop a suspected intoxicated driver and make inquiries reasonably related to that stop.[5]

Clearly, Trooper Williams had a proper basis to stop respondent's vehicle and to investigate Williams' reasonable suspicion that respondent was intoxicated. When respondent needed support to keep from falling when asked to step from his vehicle, Trooper Williams had even further reason and concommitant duty to restrict respondent's ability to leave the scene while investigating his physical condition.

The questioning of respondent while investigating respondent's ability to operate a motor vehicle on a public highway

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[5] The necessity for some questioning under these circumstances extends beyond enforcement of traffic laws. Not all erratic driving is the result of alcohol or drug intoxication. A diabetic motorist may be suffering from insulin shock; another may have incurred a stroke. Highway safety extends beyond merely issuing citations to drivers.

did not occur in the type of custody envisioned by the *Miranda* Court. *Miranda* warnings should not be required before a traffic safety officer can question a suspected drunken driver.

Although Trooper Williams had terminated respondent's ability to leave the scene before questioning respondent about his use of intoxicants, the restriction of a motorist's ability to leave the scene during a traffic stop should not be considered the equivalent of what the *Miranda* Court perceived to be the inherently coercive atmosphere of a stationhouse investigative interrogation. While any encounter with a police officer may have some minimally coercive effect upon a citizen, (see *Oregon* v. *Mathiason*, *supra.*, 429 U.S. at 495), the commonplace event of routine traffic stops on the nation's highways does not equate the detailed custodial interrogation process of a serious criminal case. Respondent's statements that he had consumed intoxicating beverages and smoked "several joints" of marijuana, admissions made to Trooper Williams at the scene of the highway safety violation investigation, were not the product of any custodial interrogation as that concept was envisioned by the *Miranda* Court.

In his cogent dissent, Judge Wellford held that an admission or confession made by an arrested motorist at the scene of the offense should be admissible without *Miranda* warnings. (Dissenting Opinion below, JA 14.) Such is the better reasoned view of custody in highway safety offenses. None of the three tests for custody, subjective intent, objective or reasonable man standard or formal words of arrest, provides a workable measure to examine the question of custody in highway safety law enforcement.

Subjective intent hinges on the now repudiated focus of investigation test. c.f. *Escobedo* v. *Illinois*, 378 U.S. 478 (1964). *Miranda* itself disavowed such test. 384 U.S. 444, n.

4. Although rejected by all of the federal circuit courts[6], at least some state courts continue to adhere to the focus test in the decision making process when custody is at issue. (See *State* v. *Roberti*, 293 Or. 59, 644 P. 2d 1104 (1982), *on rehearing*, 293 Or. 236, 646 P. 2d 1341, certiorari pending, *Oregon* v. *Roberti*, No. 82-315, petition filed August 20, 1982, 52 U.S.L.W. 3095.)[7]

The reasonable man test offers no more valid basis for determining custody in highway safety law enforcement and is more a legal fiction than the objective standard it purports to be. No reasonable person would feel that he was free

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[6] The several Federal Circuit Courts of Appeals uniformally reject the notion that subjective intent to arrest or "focus", automatically transforms a police-suspect encounter into custodial status for purposes of "*Miranda* warnings". The First, Fourth, Sixth, Ninth, Tenth and District of Columbia Circuits appear to reject subjective intent or "focus" as a consideration. See *Borodine* v. *Douzanis*, 592 F. 2d 1202, at 1206 (1st Cir., 1979); *United States* v. *Harris*, 528 F. 2d 914, 915 (4th Cir., 1975); *United States* v. *Harris*, 611 F. 2d 170, 173 (6th Cir., 1979); *Lowe* v. *United States*, 407 F. 2d 1391 (9th Cir., 1969); *United States* v. *Bridwell*, 583 F. 2d 1135, 1138 (10th Cir., 1978); *Allen* v. *United States*, 390 F. 2d 476, 478-479 (D.C. Cir., 1968). The Second, Third, Seventh and Eighth Circuits consider "focus" or subjective intent to arrest, a circumstance to be considered along with other factors. See *United States* v. *Hall*, 421 F. 2d 540 (2nd Cir., 1969); *Steigler* v. *Anderson*, 496 F. 2d 793, 799-800 (3rd Cir., 1974); *United States* v. *Jimenez*, 602 F. 2d 139, 145-146 (7th Cir., 1979); *United States* v. *Jones*, 630 F. 2d 613, 615 (8th Cir., 1980). The Fifth and Eleventh Circuits specify focus or subjective intent as one of four factors to consider. See *United States* v. *Montos*, 421 F. 2d 215, 223 (5th Cir., 1970); *United States* v. *Lueck*, 678 F. 2d 895, 900 (11th Cir., 1982). However, no circuit holds that subjective intent alone creates custody.

[7] A copy of this petition has been provided to respondent.

to ignore the visible and audible signal of a traffic safety enforcement officer, flashing lights and siren, and proceed at will. Typically, failure to heed such a signal and stop a motor vehicle may be considered an offense itself. (See Ohio Revised Code Section 4511.02, fleeing a traffic safety officer.) Moreover, it is nothing short of sophistic to state that a motorist ordered by a police officer to step out of his vehicle would reasonable or prudently believe that he was at liberty to ignore that command.

The third standard of judging custody, incantation of the words of arrest, elevates form over substance. Admissibility of respondent's statements to Williams at the scene of the investigation should not hinge on Williams' decision of when to utter formal words of arrest. Such test is disingenuous, as it merely encourages a law enforcement officer to delay articulating his earlier decision that an arrest will be affected while he continues to question the detained motorist. The timing of these formal words should not be issue determinative.

In dissent, Judge Wellford has reached a conclusion more analytically sound than any of the traditional tests for custody. None of the standard tests for custody is workable in the context of highway safety law enforcement. Admitting statements of a suspected traffic law offender made at the scene of that highway investigation without regard to *Miranda* warnings avoids decision making based upon tests which are unworkable in highway safety enforcement. The position of Judge Wellford below and that of the Fourth Circuit in *Clay* v. *Riddle, supra.*, provides a workable rule for law enforcement officials and courts alike in highway safety cases.

The rule would clarify an important area of law which currently is in disarray as construed by state courts. (The Court has had the benefit of the petition for writ of certiorari filed by the State of Oregon in *Oregon* v. *Roberti, supra.* Replica-

tion of the citations contained in that petition would serve no useful purpose here.) The rule would provide a categorical rather than case by case basis for determination of the issue of custody. c.f. *Dunaway* v. *New York*, 442 U.S. 200, 219-220 (1979) (White, J., concurring). See *Michigan* v. *Summers*, 452 U.S. 692, 705, n. 19 (1981). Rather than force an *ad hoc* examination of circumstances involved in the on scene investigation of a suspected highway safety violation, the rule would provide a clear guideline for determination of that troublesome issue.

Respondent's statements to Trooper Williams, made at the scene of the traffic law arrest, should be admissible without resort to unworkable tests for custody.

II. The Implied Consent Test and Alcohol Influence Report

In *Schmerber* v. *California*, 384 U.S. 757 (1966), this Court upheld the right of a police officer to obtain a compelled blood test against a claim that the compulsory extraction of a blood sample violated the privilege against self-incrimination embodied in the Fifth Amendment. The Court found the compelled blood sample to be real or physical evidence as distinguished from testimony or communication and thus not protected by the Fifth Amendment privilege. *Schmerber* recognized that, within due process limitations, a state may force a person suspected of driving while intoxicated to submit to a reasonable blood-alcohol test, despite the fact that the evidence was a product of compulsion.

Schmerber expressly reserved the question of whether the privilege embodied in the Fifth Amendment barred the use in a criminal trial of evidence of refusal to submit to the test. That question was answered in *South Dakota* v. *Neville*, ___ U.S. ___ (1983), 103 S. Ct. 916.

In *Neville*, this Court found that evidence of refusal to submit to a lawfully requested test involved no impermissible coercion on the part of the state. As the act of refusal in the face of a lawful request is not an act coerced by the police officer, the act is not protected by the privilege. *Ibid.*, ___ U.S. ___, 103 S. Ct. at 923. Neville's two refusals unquestionably were made after full custodial arrest; initially at the scene of the arrest and later at a police station. However, the Court declined to find that an inquiry of whether an arrestee would submit to a blood-alcohol test was interrogation within the meaning of *Miranda*. Instead, the court likened the police questioning of Neville regarding the test, to words or actions normally attendant to arrest and custody and thus, not protected by the privilege. *Id.*, ___ U.S. ___, 103 S. Ct. at 923, n. 15, citing *Rhode Island* v. *Innis*, 446 U.S. 291, at 301 (1980). Although the court grounded its

decision on the basis that the response to the question of the officer was not a coerced act, and the question not interrogation within the meaning of *Miranda*, we respectfully submit that an analysis of the underlying basis for the *Miranda* decision demonstrates that the type of routine questioning attendant to an arrest for drunken driving is not conducted in the same atmosphere or with the interrogation techniques perceived to be offensive in *Miranda*.

In the *Miranda* decision, after exploring what were felt to be commonplace interrogation techniques employed by police investigators (384 U.S. at 445-458), the majority found that "...such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner." *Miranda, supra.*, 384 U.S. at 457. In contrast, an arrest following a traffic stop, whether for drunken driving or upon a bench warrant for non-payment of outstanding parking violations, does not trigger the type of criminal investigation typical of a more serious offense. It takes no empirical study to recognize that no law enforcement agency has the resources to investigate commonplace traffic offenses to the degree utilized on more serious criminal matters. This Court has recognized the tremendous disparity between the number of felony cases, the number on non-traffic misdemeanor cases and the number of traffic cases handled by this nation's courts on an annual basis. See *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972).[9] Rather than

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[9] In 1965, some 338,000 defendants were charged with felonies in state and federal courts. At the same time, some four to five million non-traffic misdemeanor cases were processed, while by extrapolation, the nation's courts handled between 40.8 and 50 million traffic offenses annually. *Argersinger* v. *Hamlin*, 407 U.S. 25 at 34, N. 4 (1972). In 1980, the estimated number of drunken driving arrests totaled 1,426,700 nationwide. *Crime in the United States: Uniform Crime Reports, 1980.* Washington, D.C.: U.S. Government Printing Office, September 10, 1981, p. 191.

employing a carefully constructed interrogation tool designed to overbear the will of the traffic arrestee, the typical traffic control officer must return to patrol duty as rapidly as possible. There is no compelling reason to conduct custodial interrogations of highway safety law violators as virtually all such infraction occur in the presence of the law enforcement officer. The police conduct herein was not designed to isolate respondent from the assistance of counsel. c.f. *Escobedo* v. *Illinois*, 378 U.S. 478 (1964). Trooper Williams transported respondent to the Franklin County jail for a breath test of his blood-alcohol content under a strictly regulated state statute. (See Ohio Revised Code Section 4511.191; Appendix, *infra.*, p. 30.) The isolation of respondent was a necessary incident of that permissible testing procedure. c.f. *Brewer* v. *Williams*, 430 U.S. 387, 438-439 (1977) (Blackmun, J., dissenting). At the time Trooper Williams conducted the blood-alcohol test and prepared the alcohol influence report form, respondent had not been formally charged and thus was not entitled to assistance of counsel within contemplation of *Kirby* v. *Illinois*, 406 U.S. 682, 689 (1972).

As did the United States Court of Appeals for the Fourth Circuit in *Clay* v. *Riddle*, 541 F. 2d 456 (1976), the panel decision of the Court of Appeals for the Sixth Circuit below recognized that traffic offenses are commonplace events. However, the panel decision concluded that despite this fact, it was necessary to extend the prophylactic rule of *Miranda* to routine arrests for highway safety law infractions. (Opinion below, JA 12) We respectfully submit that the panel decision employed an incorrect analysis in reaching that conclusion.

The procedural rules formulated by the *Miranda* decision are prophylactic, rather than constitutionally mandated. *Miranda* v. *Arizona*, *supra.*, 384 U.S. at 467; *Michigan* v. *Tucker*, 417 U.S. 433 at 444 (1974). See *South Dakota* v.

Neville, supra., ____ U.S. ____, 103 S. Ct. at 923, n. 15; *Fare* v. *Michael C.*, 442 U.S. 707, 729 (1979) (Marshall, J., dissenting); *North Carolina* v. *Butler*, 441 U.S. 369 at 374 (1979); *Doyle* v. *Ohio*, 426 U.S. 610, 617 (1976). The *Miranda* decision itself recognizes that the now famous warnings were procedural safeguards to be employed in the absence of other fully effective measures. *Miranda* v. *Arizona, supra.*, 384 U.S. at 444. See *Estelle* v. *Smith*, 451 U.S. 454 at 466-467 (1981). Thus, the "*Miranda* rule" was designed to combat what the court perceived to be a widespread pattern of police misconduct; incommunicado interrogation techniques designed to overbear the will of the arrestee and produce a confession.

The perceived need for the prophylactic rule announced in *Miranda* is not present in the commonplace world of highway safety law enforcement. A police station by itself is not inherently coercive. *Oregon* v. *Mathiason, supra.* No widespread pattern of police misconduct is presented by the typical traffic offense arrest. Moreover, no law enforcement agency has the resources, either in manpower or facilities, to conduct detailed investigations of traffic law violations. The underlying premise upon which the *Miranda* protections were based (the perceived need to combat improper police interrogation practices) is not present in highway safety law enforcement. As the reason for the rule is not present, extension of the procedural rule to traffic offenses is unwarranted. To extend the rule without need would elevate the rule to its own reason for existence. The panel decision below employed the wrong analysis in considering whether the "*Miranda* rule" should be applied to highway safety law infractions.

This Court has observed that the Fifth Amendment privilege is "...as broad as the mischief against which it seeks to guard." *Miranda, supra.*, 384 U.S. at 459-460, quoting from *Counselman* v. *Hitchcock*, 142 U.S. 547, 562 (1892). Ap-

plication of the *Miranda* rule need be no broader than the mischief against which it sought to guard.

Additionally, the traffic offense of drunken driving is a class of offense which by its very nature renders the *Miranda* test for admissibility of statements (advice or warnings and a knowing, intelligent and voluntary waiver) of questionable benefit in protecting traditional Fifth Amendment values. First, by its nature, drunken driving presupposes that the offender's state of intoxication or impairment of function is such that the individual cannot perform the relatively simple task of operating a motor vehicle. Under these circumstances, *Miranda* warnings are of questionable value in determining whether the individual is making a rational choice to speak or not. The rule-oriented, decision-making process of *Miranda* is of little utility in determining whether the statement was voluntary. Rather, the traditional "totality of circumstances" test of voluntariness is a more appropriate vehicle to review statements uttered by drunken drivers. In that context, warnings may be a circumstance to consider, but should not be a necessary predicate to that determination. While an individual may be so intoxicated that his utterances may be considered involuntary in the traditional sense, unless an indivual is incompetent, this Court has rejected any paternalistic rule which would protect a person from his own intelligent decisions in a criminal case. See *Michigan* v. *Mosley*, 423 U.S. 96, at 108-109 (1975) (White, J., concurring). Moreover, advising a suspected intoxicated motorist that he may remain silent and refuse to answer any questions at the same time he is asked whether he will submit to a blood-alcohol test, may well create more confusion on the part of the individual than clarity of understanding.*

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* We recognize that in the traditional scenario of custodial interrogation, the rigidity of the *Miranda* rule has the virtue of specificity

The intoxication of an individual arrested for drunken driving will always present the argument that any statement made, with or without *Miranda* warnings, was involuntary. Of necessity, trial courts will be forced to examine all of the circumstances to determine the issue. Thus, the virtue of *Miranda*'s simplicity from a court prospective is absent in the case of an intoxicated motorist. Compare *Harryman* v. *Estelle*, 616, F. 2d 870, 874 (5th Cir., 1980) (noting that *Miranda* "...has allowed courts to avoid the intractable factual determinations that the former totality of circumstances approach often entailed.")

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for the police as well as the courts, thought to outweigh the burdens that the *Miranda* decision has imposed on law enforcement agencies. *Fare* v. *Michael C.*, 442 U.S. 707 at 718, (1979). The foregoing discussion however, demonstrates that the prophylactic rule fashioned in *Miranda* simply does not provide its intended bright-line precept in the context of a driver whose judgment is impaired.

III. Application of the Rule of Harmless Error

If, contrary to petitioner's submission, the Court should find that brief questioning attendant to the giving of a chemical test to detect intoxicants creates the same coercive atmosphere of persistant custodial interrogation found offensive in *Miranda* and thus, extend that holding to highway safety offense arrests, admission of McCarty's statement contained in the alcohol influence report falls within the harmless error rule. *Harrington* v. *California*, 395 U.S. 250 (1969); *Chapman* v. *California*, 386 U.S. 18 (1967).

As observed by the dissent below, McCarty's responses to Trooper Williams' questions were merely recitations of what respondent had already admitted at the scene of the traffic arrest. At that scene, after being observed weaving in and out of his expected lane of travel, respondent stated that he had consumed alcohol and had smoked several "joints" of marijuana. Respondent was unable to stand without assistance. His responses given when Trooper Williams was filling out the alcohol influence report form were merely repetitions of his earlier statements.

As recognized by Judge Wellford in dissent below, "failure to suppress what was essentially repetitious confession evidence, which should not have been admitted on the basis of failure to give *Miranda* warnings at the jail, was harmless error under the circumstances." (Opinion below, JA 14)

Therefore, assuming, *arguendo*, error, admission of respondent's repetitious statements made after submission to the intoxilyzer test was harmless beyond a reasonable doubt. *Chapman* v. *California*, *supra*. c.f. *Milton* v. *Wainwright*, 407 U.S. 371 (1972).

CONCLUSION

The foregoing demonstrates that the custodial questioning inherent to highway safety arrests for impaired driving is not within the contemplation of the decision in *Miranda* v. *Arizona*. While respondent was in custody at the time of questioning, such was not the type of restraint envisioned by the *Miranda* Court as necessitating the prophylactic warnings fashioned therein. The balance struck by the *Miranda* Court to assure the constitutional integrity of statements made to detectives by incommunicado felony suspects is simply inapplicable to impaired motorists arrested by highway safety officers.

Wherefore, the judgment of the court below should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rule 28.5(b) of the Rules of the Supreme Court, I hereby certify that the requisite number of copies (3) of the foregoing Brief of Petitioner have been served upon respondent, Richard N. McCarty, by personal service of such copies to the office of respondent's counsel of record, R. William Meeks, 503 South High Street, Columbus, Ohio 43215, by delivery to counsel for respondent, or to an employee thereof, this 23rd day of February, 1984.

I further certify that all parties required to be served have been served. The respondent's name is Richard N. McCarty, and his address is 529 Erickson, Columbus, Ohio 43213.

ALAN C. TRAVIS
Counsel of Record
for Petitioner

OHIO REVISED CODE (PAGE'S) SECTION 4511.19
Driving While Intoxicated or Drugged.
(Effective 1-1-75)

No person who is under the influence of alcohol or any drug of abuse, or the combined influence of alcohol and any drug of abuse, shall operate any vehicle, streetcar, or trackless trolley within this state.

In any criminal prosecution for a violation of this section, or ordinance of any municipality relating to driving a vehicle while under the influence of alcohol, the court may admit evidence on the concentration of alcohol in the defendant's blood at the time of the alleged violation as shown by chemical analysis of the defendant's blood, urine, breath, or other bodily substance withdrawn within two hours of the time of such alleged violation. When a person submits to a blood test at the request of a police officer under section 4511.191 [4511.19.1]of the Revised Code, only a physician or a registered nurse shall withdraw blood for the purpose of determining the alcoholic content therein. This limitation does not apply to the taking of breath or urine specimens. Such bodily substance shall be analyzed in accordance with methods approved by the director of health by an individual possessing a valid permit issued by the director of health pursuant to section 3701.143 [3701.14.3] of the Revised Code. Such evidence gives rise to the following:

(A) If there was at that time a concentration of less than ten hundredths of one percent by weight of alcohol, but more than five hundredths of one percent by weight of alcohol, in the defendant's blood, such fact shall not give rise to any presumption that the defendant was or was not under the influence of alcohol, but such fact may be considered with other competent evidence in determining the guilt or innocence of the defendant.

(B) If there was at that time a concentration of ten hundredths of one percent or more by weight of alcohol in the defendant's blood, it shall be presumed that the defendant was under the influence of alcohol.

(C) If there was at the time a concentration of five hundredths of one percent or less by weight of alcohol in the defendant's blood, it shall be presumed that the defendant was not under the influence of alcohol.

Upon the request of the person who was tested, the results of such test shall be made available to him, his attorney, or agent, immediately upon the completion of the test analysis.

The person tested may have a physician, or a qualified technician, chemist, registered nurse, or other qualified person of his own choosing administer a chemical test or tests in addition to any administered at the direction of a police officer, and shall be so advised. The failure or inability to obtain an additional test by a person shall not preclude the admission of evidence relating to the test or tests taken at the direction of a police officer.

OHIO REVISED CODE (PAGE'S) SECTION 4511.191
Implied Consent.
(Effective 10-25-78)

(A) Any person who operates a motor vehicle upon the public highways in this state shall be deemed to have given consent to a chemical test or tests of his blood, breath, or urine for the purpose of determining the alcoholic content of his blood if arrested for the offense of driving while under the influence of alcohol. The test or tests shall be administered at the direction of a police officer having reasonable grounds to believe the person to have been driving a motor vehicle upon the public highways in this state while under the influence of alcohol. The law enforcement agency by which such officer is employed shall designate which of the aforesaid tests shall be administered.

(B) Any person who is dead, unconscious, or who is otherwise in a condition rendering him incapable of refusal, shall be deemed not to have withdrawn consent provided by division (A) of this section and the test or tests may be administered, subject to sections 313.12 to 313.16 of the Revised Code.

(C) Any person under arrest for the offense of driving a motor vehicle while under the influence of alcohol shall be advised at a police station of the consequences of his refusal to submit to a chemical test designated by the law enforcement agency as provided in division (A) of this section. The advice shall be in a written form prescribed by the registrar of motor vehicles and shall be read to such person. The form shall contain a statement that the form was shown to the person under arrest and read to him in the presence of the arresting officer and one other police officer or civilian police employee. The witnesses shall certify to this fact by signing the form.

(D) If a person under arrest for the offense of driving a motor vehicle while under the influence of alcohol refuses upon the request of a police officer to submit to a chemical test designated by the law enforcement agency as provided in division (A) of this section, after first having been advised of the consequences of his refusal as provided in division (C) of this section, no chemical test shall be given, but the registrar of motor vehicles, upon the receipt of a sworn report of the police officer that he had reasonable grounds to believe the arrested person had been driving a motor vehicle upon the public highways in this state while under the influence of alcohol and that the person refused to submit to the test upon the request of the police officer and upon the receipt of the form as provided in division (C) of this section certifying that the arrested person was advised of the consequences of his refusal, shall suspend his license or permit to drive, or any nonresident operating privilege for a period of six months, subject to review as provided in this section; or if the person is a resident without a license or permit to operate a motor vehicle in this state, the registrar shall deny to the person the issuance of a license or permit for a period of six months after the date of the alleged violation. The suspension or denial shall continue for the entire six-month period subject to review as provided in this section and subject to termination as provided in division (I) of this section.

(E) Upon suspending the license or permit to drive or nonresident operating privilege of any person, as provided in division (D) of this section, the registrar shall immediately notify the person in writing, at his last known address, and inform him that he may petition for a hearing as provided in division (F) of this section. If a person whose license, permit to drive, or nonresident operating privilege has been suspended, petitions for a hearing or appeals any decision that is adverse to him, the suspension shall begin

at the termination of any hearing or appeal unless the hearing or appeal resulted in a decision favorable to the person.

(F) Any person whose license or permit to drive or nonresident operating privilege has been suspended under this section, may, within twenty days of the mailing of the notice provided above, file a petition in the municipal court or the county court, or in case the person is a minor in the juvenile court, in whose jurisdiction the person resides or in whose jurisdiction the arrest occurred if the person is not a resident of this state, agreeing to pay the cost of the proceedings and alleging error in the action taken by the registrar of motor vehicles under division (D) of this section or alleging one or more of the matters whithin the scope of the hearing as provided in this section, or both. Such petitioner shall notify the registrar of the filing of the petition and send him a copy. The scope of the hearing shall be limited to the issues of whether a police officer had reasonable ground to believe the person had been driving a motor vehicle upon the public highways in this state while under the influence of alcohol, whether the person was placed under arrest, whether he refused to submit to the test upon request of the officer, whether he was advised of the consequences of his refusal, and whether his employment is of such a nature that his ability to continue in the employment would be seriously affected if the suspension otherwise required under this section is imposed.

(G)(1) The registrar shall furnish the court a copy of the registrar's affidavit as provided in division (C) of this section.

(2) In hearing the matter and determining whether the person has shown error in the action taken by the registrar of motor vehicles under division (D) of this section, the court shall decide the issue upon the registrar's certified

affidavit and such additional relevant, competent, and material evidence as either the registrar or the person whose license is sought to be suspended submits.

(3) In the proceedings, the registrar shall be represented by the prosecuting attorney of the county in which the person resides if the petition is filed in the county court, except where the petitioner is a resident of a city or village within the jurisdiction of a county court in which case the city director of law or village solicitor shall represent the registrar. If the petition is filed in the municipal court, the registrar shall be represented as provided in section 1901.34 of the Revised Code.

(4) If the court finds from the evidence submitted that the person has failed to show error in the action taken by the registrar of motor vehicles under division (D) of this section or in one or more of the matters within the scope of the hearing as provided in division (F) of this section, or both, then the court shall assess the cost of the proceeding against such person and shall impose the suspension provided in division (D) of this section. If the court finds that the person has shown error in the action taken by the registrar of motor vehicles under division (D) of this section or in one or more of the matters within the scope of the hearing as provided in division (F) of this section, or both, the cost of the proceedings shall be paid out of the county treasury of the county in which the proceedings were held, and the suspension provided in division (D) of this section shall not be imposed.

(5) The court may, if it finds reasonable cause to believe that suspension would seriously affect the person's ability to continue in his employment, grant the person occupational driving privileges during the period of suspension.

(6) If a person whose license has been suspended under this section has not previously filed a petition alleging that

the suspension would seriously affect the person's ability to continue his employment, the person may, at any time during the period of suspension, file a petition in any court that has jurisdiction over the person under division (F) of this section alleging such fact. The court may, upon satisfactory proof that there is reasonable cause to believe that suspension would seriously affect the person's ability to continue in his employment, grant the person occupational driving privileges during the period for which the suspension would otherwise be imposed. The petitioner shall pay the costs of the proceeding and shall notify the registrar of the filing of the petition and send him a copy. The registrar shall be represented as provided in division (G)(3) of this section.

(7) In granting occupational driving privileges, the court may impose any condition it considers reasonable and necessary to limit the use of a motor vehicle by the person. The court shall deliver to the person a permit card, in a form to be prescribed by the court, setting forth the time, place, and other conditons limiting the defendant's use of a motor vehicle. The grant of occupational driving privileges shall be conditioned upon the person's having the permit in his possession at all times during which he is operating a motor vehicle.

A person granted occupational driving privileges who operates a motor vehicle for other than occupational purposes, in violation of any condition imposed by the court, or without having the permit in his possesion, is guilty of a violation of section 4507.38 of the Revised Code.

(8) The court shall give information in writing of any action taken under this section to the registrar of motor vehicles.

(H) When it has been finally determined under the procedures of this section that a nonresident's privilege to operate a motor vehicle in this state has been suspended,

the registrar shall give information in writing of the action taken to the motor vehicle administrator of the state of the person's residence and of any state in which he has a license.

(I) A suspension of the license or permit to drive of a resident, the suspension of the operating privilege of a nonresident, or the denial of a license or permit for refusal to submit to a chemical test to determine the alcoholic content of the person's blood pursuant to this section, shall be terminated by the registrar upon receipt of notice of the person's entering a plea of guilty or of his conviction after entering a plea of no contest under Criminal Rule 11, to the offense of driving a motor vehicle while under the influence of alcohol, if the offense for which the plea is entered arose from the same incident that led to the suspension or denial.

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Case No. 83-710

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HARRY J. BERKEMER, SHERIFF
OF FRANKLIN COUNTY, OHIO
Petitioner,

v.

RICHARD N. McCARTY,
Respondent.

**ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether *Miranda* warnings must be given to a person who has been arrested and is about to undergo jail interrogation for the misdemeanor of driving while under the influence of intoxicants, which offense is punishable by confinement for up to six months and carries a mandatory minimum term of three days?

2. Whether *Miranda* warnings must be given to a person who has been stopped by a police officer when the officer has probable cause to believe that the person has committed an offense; a reasonable person, under all the circumstances, would not feel free to leave; and the officer is about to interrogate the person?

3. Whether Petitioner, not having raised the issue in any court below, is now entitled to rely on the harmless error doctrine, and, if so, whether the admission of Respondent's jail statements was harmless beyond a reasonable doubt?

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N. Sobel, *The New Confession Standards* 56-58 (1966) 45

O. Stephens, *The Supreme Court and Confessions of Guilt* 169-74 (1973) 30

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Case No. 83-710

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HARRY J. BERKEMER, SHERIFF
OF FRANKLIN COUNTY, OHIO
Petitioner,

v.

RICHARD N. McCARTY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT

OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit is now reported as *McCarty v. Herdman*, 716 F. 2d 361 (6th Cir. 1983), and is set out in the Joint Appendix at J.A.7.* The decision of the United States District Court for the Southern District of Ohio, Eastern Division, is unreported and is set out in the Appendix to Brief in Opposition to Petition at A.17. The decision of the Franklin County Court of Appeals in set out in the Appendix to Brief in Opposition to Petition at A.9.

*References to the appendix to the brief in opposition to petition for writ of certiorari are designated as "A." while references to the joint appendix are designated as "J.A."

JURISDICTION

Respondent accepts Petitioner's statement of jurisdiction.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATE STATUTES INVOLVED

Ohio Revised Code (Page's) Section 4511.19, Driving While Intoxicated (Eff. 1-1-75):

No person who is under the influence of alcohol or any drug of abuse, or the combined influence of alcohol and any drug of abuse, shall operate any vehicle, streetcar, or trackless trolley within this State. ...

Ohio Revised Code (Page's) Section 4511.99, Penalties (Eff. 3-15-79):

(A) Whoever violates Section 4511.19 of the Revised Code is guilty of a misdemeanor of the first degree, in addition to the license suspension or revocation provided in Section 4507.16 of the Revised Code. At least three days' imprisonment is mandatory under this division. ...

Ohio Revised Code (Page's) Section 2929.21, Penalties for Misdemeanor (Eff. 8-30-78):

(A) Whoever is convicted of or pleads guilty to a misdemeanor other than a minor misdemeanor shall be imprisoned for a definite term or fined, or both, which term of imprisonment and fine shall be fixed by the court as provided in this section.

(B) Terms for imprisonment for misdemeanors shall be imposed as follows:

(1) For a misdemeanor of the first degree, not more than six months. ...

(C) Fines for misdemeanors shall be imposed as follows:

(1) For a misdemeanor of the first degree, not more than one thousand dollars. ...

MISCELLANEOUS OHIO STATUTES

(See Appendix to this brief)

STATEMENT OF THE CASE

Respondent is satisfied with Petitioner's Statement of the Case, with the following additions:

At the time Respondent McCarty exited his automobile at the scene, Trooper Williams concluded that he would be charged with a traffic offense; and, therefore, his freedom to leave the scene was terminated. (Stipulation of Fact, A-1.)

A conviction of the offense Respondent McCarty was charged with, operating a motor vehicle while under the influence of alcohol or drugs, Ohio Revised Code (Page's) Section 4511.19, requires a mandatory three days' imprisonment, Ohio Revised Code (Page's) Section 4511.99, with a potential imprisonment of up to six months and fine of up to one thousand dollars, Ohio Revised Code (Page's) Section 2929.21.

Under Ohio Rules of Criminal Procedure, Rule 12(H), "The plea of no contest does not preclude a defendant from asserting upon appeal that the trial court prejudicially erred in ruling on a pretrial motion, including a pretrial motion to suppress evidence."

SUMMARY OF ARGUMENT

I. *Inadmissibility of Respondent's Jail Statements*

Respondent was arrested for driving while intoxicated and was taken to jail. He was interrogated about the offense and made incriminating statements. At no time was he advised of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). Since Respondent was subjected to custodial interrogation without advice, his statements were inadmissible. *Id.*

A. Petitioner misreads *Miranda* when he tries to limit it to situations of intense interrogation. Although *Miranda* did refer to some examples of brutality and although it cited some illustrations from police manuals of hard or intense interrogation, *Miranda* was clearly concerned with all custodial interrogation, not just some category of it. 384 U.S. at 447, 455, 457, 491-92.

B. Petitioner's effort to exempt all traffic offenses from the scope of *Miranda* is inconsistent with the concerns and objectives underlying *Miranda*. Under Petitioner's argument, the admissibility of incriminating statements in traffic misdemeanor cases would be governed only by the involuntary confession rule. Yet, it was precisely that rule, with its amorphous concepts of "involuntariness" and "totality of the circumstances," that *Miranda* found inadequate. Stone, *The Miranda Doctrine in the Burger Court*, 1977 Sup. Ct. Rev. 99, 102-3. As an alternative to the involuntary confession rule, *Miranda* applied the fifth amendment privilege against self-incrimination to custodial police interrogation. Recognizing, however, that custodial interrogation "contains inherently compelling pressures," 384 U.S. at 467, and fearful that suspects would, therefore, fail to claim their privilege as a result of the very fact of custodial interrogation, *Miranda* reformulated the fifth amendment privilege to require advice and waiver. Thus, the Court fashioned a *per se* rule as an alternative to the involuntary confession rule's

"totality of the circumstances" approach. Petitioner's argument is fundamentally in conflict with this development.

C. Petitioner's argument is inconsistent with other decisions of this Court delineating the scope of *Miranda*. This Court has applied *Miranda* to persons who were in physical custody even though the interrogation was brief and occurred in familiar surroundings. *Orozco v. Texas*, 394 U.S. 324 (1969); *Mathis v. United States*, 391 U.S. 1 (1968). By contrast, it has declined to apply *Miranda* where the suspect was questioned in the presence of impartial observers, *United States v. Mandujano*, 425 U.S. 564 (1976) (plurality opinion); where the suspect was not in physical custody, *Beckwith v. United States*, 425 U.S. 341 (1976); and where the suspect voluntarily went to the interrogation, was not under arrest, and was allowed to leave after the interrogation. *Minnesota v. Murphy*, ____ U.S. ____, 52 U.S.L.W. 4246 (1984); *California v. Beheler*, ____ U.S. ____, 103 S. Ct. 3517 (1983); *Oregon v. Mathiason*, 429 U.S. 492 (1977). Respondent was interrogated in the unfamiliar environment of the jail. He did not go there voluntarily; he was arrested. He was not free to leave during the interrogation, and was not allowed to leave after the interrogation. Consequently, he was entitled to *Miranda* warnings. Moreover, if *Miranda* warnings must be given to a pretrial detainee who is being questioned by a court appointed psychiatrist conducting a neutral competency examination, *Estelle v. Smith*, 451 U.S. 454 (1981), surely Respondent was entitled to them.

D. Petitioner's argument is inconsistent with the weight of lower court authority. Of the twenty-two jurisdictions whose cases are sufficiently definite to warrant consideration, fourteen apply *Miranda* to traffic misdemeanors. A decision for Respondent in the case at bar will, therefore, be less disruptive of state judicial processes than will a decision for Petitioner.

E. Miscellaneous arguments for not applying *Miranda* to traffic misdeameanors are meritless. (1) There is no reason

to believe that most persons arrested for driving while intoxicated would not understand *Miranda* warnings, nor is there reason to believe that it would be impossible to prove waiver in such cases. (2) Any potential confusion between *Miranda* advice and the state's right to inquire whether the driver will take an intoxication test can be avoided by first making the inquiry and obtaining the answer, and then giving the *Miranda* advice. (3) Although incriminating statements made by an intoxicated person may in rare instances be "involuntary" under the "totality of the circumstances," the existence of an "involuntariness" argument does not preclude reliance on *Miranda*. (4) There is no evidence that *Miranda* has significantly affected the rate of confession, crime clearance, and conviction. Thus, there is no reason to believe that *Miranda* will adversely affect traffic law enforcement. Moreover, custodial interrogation in traffic cases is rare. (5) The scope of the right to appointed counsel in misdemeanor cases should not control whether *Miranda* warnings are required. In any event, the offense for which Respondent was arrested, about which he was interrogated, and of which he was convicted, carried mandatory confinement. Ohio Rev. Code § 4511.99 (1979). Consequently, an indigent would have been entitled to appointed counsel under *Scott v. Illinois*, 440 U.S. 367 (1979).

F. The line that Petitioner seeks to draw between traffic misdemeanors and all other offenses is arbitrary, unprincipled, and unadministrable. Depending on the driver's prior record, some traffic offenses may be felonies. Thus, police officers who were investigating these offenses would not know whether they were dealing with misdemeanors or felonies, and would not know whether to give the *Miranda* warning. Moreover, what begins as a traffic misdemeanor investigation may escalate into an investigation for a more serious offense. If a line is drawn between traffic misdemeanors and all other offenses, the question will inevitably arise whether, and at what point, the investigation shifted

from one offense to another, or whether the traffic investigation was pretextual.

Nor should a line be drawn between the offense of impaired driving and all other offenses. Under that line, some felonies might be removed from the coverage of *Miranda* while some misdemeanors would remain.

Finally, no line should be drawn between all misdemeanors and felonies. The misdemeanor-felony line varies from state to state and even within a single state. Drawing a misdemeanor-felony line would give *Miranda* different meanings in different states, and would make it hard for police officers in the same state to know whether warnings are required.

II. *Inadmissibility of Respondent's Statements Made During Field Interrogation*

Respondent was sujected to field interrogation and made certain incriminating admissions without first being provided *Miranda* warnings by the officer. Prior to interrogating Respondent at the scene, the officer had probable cause to believe that a series of traffic violations had been committed by Respondent, including the offense of driving while under the influence of alcohol or drugs, in violation of Ohio Rev. Code § 4511.19 (1982).

A. Respondent was interrogated within the meaning of *Rhode Island v. Innis,* 446 U.S. 291 (1980) since the officer's express questioning was designed to elicit incriminating responses from Respondent concerning intoxicants he had consumed.

B. The field interrogation was not *general* on-the-scene interrogation, as permitted by *Miranda v. Arizona, supra,* since the officer had probable cause to believe Respondent committed serious traffic offenses and his field interrogation was designed to obtain admissions that would later be used against Respondent in court.

C. Respondent was in custody within the meaning of *Miranda v. Arizona, supra,* since, under an objective test a reasonable person would have concluded that he had been deprived of his freedom to leave.

D. Investigative stops by law enforcement officers pursuant to *Terry v. Ohio,* 392 U.S. 1 (1968), are not affected by Respondent's objective standard for determining custody.

Respondent submits that custody occurs when probable cause for arrest exists, in conjunction with an objective conclusion that Respondent was not free to leave the scene. The requirement of probable cause distinguishes Respondent's custodial status in the present case from the lesser permissible investigatory standard announced in *Terry.*

III. *Irrelevance of Harmless Error Doctrine*

Although Petitioner claims that the use of Respondent's jail statements was harmless error, he failed to raise the claim at any stage below as well as in his Petition for a Writ of Certiorari. Consequently, he should be precluded from raising the issue now. Parties opposing habeas relief should be held to the same standards of procedural regularity as parties seeking such relief. *Cf. Engle v. Isaac,* 456 U.S. 107 (1982).

In any event, Respondent's jail statements supplied important evidence that he had been driving while under the influence of intoxicants. Consequently, the use of the statements was not harmless beyond a reasonable doubt. *Chapman v. California,* 386 U.S. 18 (1967).

ARGUMENT

INTRODUCTORY STATEMENT

The record makes it abundantly clear that a police officer stopped Respondent on probable cause to believe that he was driving erratically (A.2). Under all the circumstances, as Petitioner admits, Brief for Petitioner at 16-17, a reasonable person would not have felt free to leave. Within the meaning of *Rhode Island v. Innis*, 446 U.S. 291 (1980), the officer interrogated Respondent about the misdemeanor of driving while intoxicated (A.2). The interrogation produced incriminating statements, and the officer formally placed Respondent under arrest and took him to a jail (A.2). At the jail, Respondent was again questioned, and made further incriminating statements. Neither at the scene nor at the jail was Respondent advised of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966) (A.3).

At issue in the case at bar is whether *Miranda* warnings were required in either setting. Petitioner's brief addresses these issues in chronological order—first the field interrogation statements and then the jail statements—and, under ordinary circumstances, we would follow suit. In the case at bar, however, the crucial statements are the ones made at the jail. If Petitioner is able to persuade the Court that *Miranda* is inapplicable to the jail interrogation, then, *a fortiori*, *Miranda* will be inapplicable to the field interrogation. For that reason, we shall depart from chronological order and first address the events that occurred at the jail. Then we shall discuss the field interrogation.[1]

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[1]Although the court below held the field interrogation statements admissible (J.A. 12-13) and although Respondent did not cross-petition on that issue, a cross-petition is unnecessary. *See* authorities collected in R. Stern and E. Gressman, Supreme Court Practice 478-79 (5th ed. 1978).

I. THE COURT BELOW CORRECTLY SET ASIDE RESPONDENT'S CONVICTION. *MIRANDA* WARNINGS MUST BE GIVEN TO A PERSON WHO HAS BEEN ARRESTED AND IS ABOUT TO UNDERGO JAIL INTERROGATION FOR THE MISDEMEANOR OF DRIVING WHILE UNDER THE INFLUENCE OF INTOXICANTS, WHICH OFFENSE IS PUNISHABLE BY CONFINEMENT FOR UP TO SIX MONTHS AND CARRIES A MANDATORY MINIMUM TERM OF THREE DAYS.

Point II of Petitioner's brief, which addresses the admissibility of the jail statements, is entitled "The Implied Consent Test and Alcohol Influence Report." Brief for Petitioner at 19. The title suggests that the issue of Respondent's statements is somehow related to the rules that permit compulsory intoxication tests, *Schmerber v. California*, 384 U.S. 757 (1966), and allow the state to make evidentiary use of an incriminating refusal to take such a test. *South Dakota v. Neville*, ____ U.S. ____, 103 S. Ct. 916 (1983). The suggestion is misleading. After he was arrested and taken to jail, Respondent was asked to take an intoxilyzer test, and he did. The test was negative (A.2). Immediately thereafter, without receiving *Miranda* warnings, he was interrogated (A. 2, 3). We do not question the State's authority under *Schmerber* and *Neville* to have an implied consent and compulsory testing process. We do urge, however, that it was constitutionally impermissible to interrogate Respondent without first giving the warnings required by *Miranda*.

Petitioner's basic argument, which spans both interrogation episodes, is that this Court in *Miranda* was concerned only with "lengthy, incommunicado" interrogations and with the interrogee's perception that the interrogation would continue "indefinitely." Brief for Petitioner at 12. Since, in Petitioner's view, interrogation for traffic offenses is not so

intense. Petitioner seeks the categorical exemption of traffic offenses from the coverage of *Miranda,* Brief for Petitioner at 20-22, even though Petitioner concedes that the Respondent was in custody. *Id.* at 26. Petitioner's argument was unanimously rejected by the court below with reference to the jail interrogation and should also be rejected by this Court. The argument is contrary to the language of *Miranda;* to the conditions that led to *Miranda,* and the concerns and objectives underlying *Miranda;* to other decisions of this Court delineating the scope of *Miranda;* and to the resolution of this issue in both the lower court cases and scholarly commentary. Moreover, there is no merit to the subsidiary arguments made by the Petitioner, by Amicus State of Ohio, or in a few of the lower court cases. Finally, the line that Petitioner seeks to draw between traffic misdemeanors and all other offenses is arbitrary, unprincipled, and unadministrable. We shall address each of these matters below.

A. Petitioner's Argument Is Contrary to the Language of *Miranda.*

This Court made it unmistakably clear in *Miranda* that a four-fold warning of rights must be given prior to police interrogation of a suspect in custody. That Respondent was interrogated by a police officer is undisputed. That he was under arrest is also undisputed. Brief for Petitioner at 6. That he was, therefore, in a status of "custody," as that word was defined in *Miranda,* cannot be gainsaid.

> By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.
>
> . . .
>
> Today, then, there can be no doubt that the Fifth Amendment privilege is available outside of criminal

> court proceedings and serves to protect persons *in all settings* in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves.

384 U.S. at 444, 467 (emphasis added). See also *id.* at 445, 478. Although courts have occasionally questioned the meaning of "otherwise deprived of his freedom of action in any significant way," see cases collected in Kamisar, *"Custodial Interrogation" Within the Meaning of Miranda,* in Criminal Law and the Constitution—Sources and Commentaries 335 (1968), "custody" surely exists when a person has been arrested and taken to a police station or jail. Indeed, that was precisely the situation in *Miranda, Westover v. United States,* and *California v. Stewart,* three of the four cases that were decided under the name of *Miranda. See* 384 U.S. at 491, 494, 497. In the fourth case, *Vignera v. New York,* this Court applied *Miranda* to protect a suspect who was "picked up," taken to jail, and interrogated, even though the record apparently did not show a formal arrest. 384 U.S. at 493. Given that Respondent in the case at bar was formally arrested and taken to a jail, he must be deemed to have been in custody.

In an effort to avoid the force of this point as well as the fact that no language in *Miranda* explicitly creates a categorical exemption for any situation, traffic or otherwise, Petitioner and Amicus State of Ohio have constructed an argument that *Miranda* was solely or at least primarily concerned with brutal or otherwise hard or intense interrogation. See Brief for Petitioner at 12, 20; Brief for Amicus Curiae State of Ohio at 7-10. This argument profoundly misreads *Miranda.*

Although this Court in *Miranda* did refer to examples of brutality, 384 U.S. at 445-46, and although it cited illustrations from police interrogation manuals of hard or intense interrogation, *id.* at 449-55, this Court was quick to point

out that brutality is today "undoubtedly the exception," *id.* at 447, and it concluded, *id.* at 455, "Even *without employing brutality, the 'third degree' or the specific strategems described above, the very fact of custodial interrogation* exacts a heavy toll on individual liberty and trades on the weakness of individuals" (emphasis added). Thus, the Court's broader concern with *all* custodial interrogation clearly appears. Indeed, in the *Miranda* case itself, the entire interrogation, including the writing of the confession, took only two hours and involved no brutality or other opprobrious practices. *Id.* at 457, 491-92; *id.* at 518, 519 (Harlan, J., dissenting).

Petitioner's short-sighted view of *Miranda* is also refuted by the dissenting opinions in *Miranda.* The Justices who dissented clearly understood the majority opinion to be concerned with all custodial interrogation, not just some category of it. *See* 384 U.S. at 505 (Harlan, J., dissenting) ("to reinforce the nervous or ignorant suspect"); *id.* at 512 (Harlan, J., dissenting) (to eliminate "the subtle influence of the atmosphere and surroundings"); *id.* at 516 (Harlan, J., dissenting) ("minor pressures and disadvantages intrinsic to any kind of interrogation"); *id.* at 530 (White, J., dissenting) (majority opinion considers "in-custody interrogation, without more, to be a violation of the Fifth Amendment").

If the *Miranda* Court was concerned with all custodial interrogation, not just some category of it, why did it cite examples of brutal or otherwise intense interrogation? The answer is that, prior to *Miranda,* the fifth amendment privilege against compulsory self-incrimination was regarded by many as limited to "formal" proceedings, such as judicial hearings, at which answers could be compelled by the threat of contempt. Since the police did not have the contempt power, so the argument went, the privilege was inapplicable to police interrogation. C. McCormick, Evidence § 125 (2nd ed. 1972).

> In the course of toppling this "legal reasoning" the Court dwelt on the cases before it and many extracts from police interrogation manuals as the most *obvious* and *graphic examples* of the unreality, inadequacy and casuistry of the old reasoning. ...But *to limit the* impact of *Miranda* to the most poignant examples of the need for the applicability of the privilege to non-judicial, informal confrontations—as some state cases seem to suggest—mistakes, it is submitted, the "advocacy" in the *Miranda* opinion, if you want to call it that, for its scope.
>
> . . .
>
> ...A person significantly deprived of his freedom by an officer who then asks him questions relating to the crime being investigated is entitled to the *Miranda* warnings without regard to whether his plight amounts to, or approaches, the pressures operating on the defendants in the *Miranda* cases or those working on one being subjected to the psychological coercion recommended in police interrogation manuals.

Kamisar, *"Custodial Interrogation" Within the Meaning of Miranda,* in Criminal Law and the Constitution—Sources and Commentaries 335, 336, 337, 370 (1968) (emphasis in original) (citations omitted). *See also* Stone, *The Miranda Doctrine in the Burger Court,* 1977 Sup. Ct. Rev. 99, 104-5.

Petitioner's grudging interpretation of *Miranda* mistakes "advocacy" for "scope," and should therefore be rejected.[3]

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[3]It is worth noting that, in requiring advice about the appointment of counsel, the Court cited, at 384 U.S. 473 n. 42, *People v. Witenski,* 15 N.Y. 2d 392, 207 N.E. 2d 358 (1965). *Witenski* involved the right to appointed counsel at trial before a Justice of the Peace for

B. Petitioner's Argument Is Inconsistent with the Conditions that Led to *Miranda* and with the Concerns and Objectives Underlying *Miranda*.

Putting to one side the then-recent developments in *Massiah v. United States*, 377 U.S. 201 (1964), and *Escobedo v. Illinois*, 378 U.S. 1 (1964), *Miranda* was preceded doctrinally by the involuntary confession rule. Under that rule, a confession is constitutionally inadmissible if shown, by the "totality of circumstances" to be "involuntary." Comment, *The Coerced Confession Cases in Search of a Rationale*, 31 U. Chi. L. Rev. 313, 318 (1964). The deficiencies of the rule—particularly the difficulty of defining "voluntariness" and "involuntariness"—were widely noted even before *Miranda*. *See* L. Herman, *The Supreme Court and Restrictions on Police Interrogation*, 25 Ohio St. L.J. 449, 454, 457 (1964); Kamisar, *What Is an "Involuntary" Confession?*, 17 Rutg. L. Rev. 728 (1963) *(passim)*; Comment, *supra (passim)*. Although the Court said relatively little about the involuntary confession rule in *Miranda*, it hinted at its dissatisfaction, 384 U.S. at 448, and pointedly ignored the argument of the dissenting Justices that the rule worked well and should not be replaced or supplemented. *Id.* at 502-3 (Clark, J., dissenting); *id.* at 506-9 (Harlan, J., dissenting); *see id.* at 535 (White, J., dissenting). As a result, *Miranda* has been viewed consistently as motivated by a desire to create a clearer test than "involuntariness" and "totality of the circumstances." Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 Mich. L. Rev. 59, 94-104 (1966); Comment, *Miranda and Minor Of-*

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the petty misdemeanor of stealing $2.00 worth of apples. Thus, even though *Argersinger v. Hamlin*, 407 U.S. 25 (1972), was six years away, the Court, in fashioning *Miranda*, was aware that the right to counsel could be extended to minor offenses.

fenses, 14 Ariz. L. Rev. 766, 770, 785 (1972); Comment, *Miranda and Misdemeanors,* 14 Land & Water L. Rev. 521, 523, 524 (1979).

> Given the Court's inability to articulate a clear and predictable definition of "voluntariness," the apparent persistence of state courts in utilizing the ambiguity of the concept to validate confessions of doubtful constitutionality, and the resultant burden on its own workload, it seemed inevitable that the Court would seek "some automatic device by which the potential evils of incommunicado interrogation [could] be controlled."

Stone, *The Miranda Doctrine in the Burger Court,* 1977 Sup. Ct. Rev. 99, 102-3 (footnotes omitted), quoting from W. Schaeffer, The Suspect and Society 10 (1967).

The Court found that "device" in the fifth amendment's privilege against compulsory self-incrimination. Although *Massiah* was solely a sixth amendment right to counsel case and *Escobedo* largely that, *Miranda* is, beyond argument, a fifth amendment case. This is clear from the opening paragraph of the opinion, 384 U.S. at 439, and from everything that follows. *See id.* at 441, 442, 444, 458-64, 465, 467, 471, 476. The Court's major concern in *Miranda* was to establish the applicability of the privilege to the "informal" interrogation of a suspect in custody. In the Court's view, it was "at this point that our adversary system of criminal proceedings commences, distinguishing itself at the outset from the inquisitorial system recognized in some countries." *Id.* at 477.

In applying the fifth amendment to custodial interrogation, however, the Court immediately encountered a problem. Under the traditional view of the privilege, protection was gauged by a "claim-compulsion" test. That is, a person undergoing questioning was required to claim the privilege affirmatively. If he did, the questioner was then obligated to refrain from compulsion. If the person being questioned did not claim the privilege, however, his answers would not be

regarded as compelled. *Minnesota v. Murphy*, ____ U.S. ____, 52 U.S.L.W. 4246, 4248-49 (1984). Fearful that "the process of in-custody interrogation of persons suspected or accused of crime contains *inherently* compelling pressures," 384 U.S. at 467 (emphasis added); see also *id.* at 450, 455, 458, 477, 478, and that persons undergoing custodial interrogation would, therefore, fail to claim their privilege as a result of the very fact of custodial interrogation, the Court reformulated the fifth amendment to require both advice and waiver prior to custodial interrogation. *Id.* at 444, 467-79.

In reformulating the fifth amendment privilege in *Miranda*, the Court intended to fashion a *per se* rule as an alternative to the involuntary confession rule's "totality of the circumstances" test. This is too apparent from the Court's language to require extended discussion. *Id.* at 444, 468, 469 n. 3, 471-72, 473 n. 43. Indeed, the dissenting Justices so read the majority opinion, *id.* at 500 (Clark, J., dissenting); *id.* at 504 (Harlan, J., dissenting), and Justice White explicitly referred to the majority's approach as *"per se."* *Id.* at 539, 544. The very purpose of a *per se* rule is to avoid a close scrutiny of the totality of the circumstances on a case-by-case basis. If the rule works well enough in a range of cases, it will be made applicable to all, in the interest of establishing a bright-line standard. *See Illinois v. Lafayette*, ____ U.S. ____, 103 S. Ct. 2605 (1983); *New York v. Belton*, 453 U.S. 454 (1981); *United States v. Robinson*, 414 U.S. 218 (1973). Indeed, *per se* rules that originated in felony cases have been applied even to traffic misdemeanor cases. *United States v. Robinson, supra.* Although the *per se* rule in *Robinson* involved search incident to arrest and thus operated to the government's benefit, the concept of *per se* rules is party-neutral and should be applied even-handedly. That is all the Respondent asks in the case at bar.

Petitioner's argument that all traffic misdemeanors be excluded from the coverge of *Miranda* totally ignores the con-

cerns and objectives described above. If the argument is accepted, the only constitutional safeguard will be a legal test that has been tried and found wanting. If a "totality of circumstances" doctrine such as the involuntary confession rule works poorly in the high-visibility arena of felony court, it is doomed to fail miserably in the low-visibility arena of traffic court. *See* L. Herman, The Right to Counsel in Misdemeanor Court 80 (1973).

Petitioner's argument also ignores the fact, recognized by the court below (J.A. 10-11), that the fifth amendment privilege—the very heart of *Miranda*—is applicable to all criminal cases, traffic misdemeanors included. *State v. Pyle,* 19 Ohio St. 2d 64, 69, 249 N.E. 2d 826, 829 (1969) (dissenting opinion), *cert. denied,* 396 U.S. 1007 (1970); J. Israel & W. LaFave, Criminal Procedure—Constitutional Limitations 233 (3rd ed. 1980). Moreover, it ignores the fact—well known to anyone who has received even a traffic ticket—that traffic patrol officers "display [the] air of confidence in the suspect's guilt" that so concerned the Court in *Miranda. Id.* at 450; see also *id.* at 455. Finally, it ignores the psychological impact of "custody."

> [T]he imbalance between the state and the defendant begins with arrest and detention, for these experiences influence the detained in ways analogous to interrogation: the negative implications of silence, the self-mortification or extreme humiliation at being arrested, the desire to "shield the self" from potentially humiliating questioning and the emotional stress caused by the symbols of the law's authority even in persons of higher status.

Driver, *Confessions and the Social Psychology of Coercion,* 82 Harv. L. Rev. 42, 60 (1968).

Petitioner's argument ignores, and is inconsistent with, the conditions that led to *Miranda* and the concerns and ob-

jectives underlying *Miranda*, and should therefore be rejected.[3]

C. Petitioner's Argument Is Inconsistent with Other Decisions of This Court Delineating the Scope of *Miranda*

This Court has decided eight cases delineating the scope of *Miranda*. In chronological order, they are *Mathis v. United States*, 391 U.S. 1 (1968); *Orcozo v. Texas*, 394 U.S. 324 (1969); *Beckwith v. United States*, 425 U.S. 341 (1976); *United States v. Mandujano*, 425 U.S. 564 (1976) (plurality opinion); *Oregon v. Mathiason*, 429 U.S. 492 (1977); *Estelle v. Smith*, 451 U.S. 454 (1981); *California v. Beheler*, ____ U.S. ____, 103 S.Ct. 3517 (1983); and *Minnesota v. Murphy*, ____ U.S. ____, 52 U.S.L.W. 4246 (1984). Taken singly or together, they demonstrate that *Miranda* has been interpreted far more broadly than Petitioner is willing to recognize. For this reason, too, Petitioner's argument should be rejected.

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[3]Related to, but also separate from, the concerns discussed above, is another: that a suspect not incriminate himself in the misguided "belief that you must answer all questions put to you by a policeman, or at least that it will be the worse for you if you do not." 384 U.S. at 468 n. 37, quoting P. Devlin, The Criminal Prosecution in England 32 (1958). *See also* Kamisar, *Brewer v. Williams, Massiah, and Miranda: What Is "Interrogation"? When Does It Matter?*, 67 Geo. L. J. 1, 51 (1978). Some may perceive this concern as educative. Others may view it as an egalitarian effort to insure that the uneducated suspect is put on a par with the educated one. Whatever the correct characterization, *Miranda* repeatedly evidences the concern. 384 U.S. at 468, 469, 470, 471, 473. Even Justice Harlan's dissenting opinion recognized that the majority was concerned "to reinforce the nervous or ignorant suspect." *Id.* at 505.

Needless to say, Petitioner's argument against the requirement of advice is diametrically opposed to this educative or egalitarian concern.

In *Mathis,* the defendant, who was serving a prison sentence, was questioned in prison by an Internal Revenue Service agent. This Court held *Miranda* applicable even though the surroundings were familiar to the interrogee, 391 U.S. at 6 (White, J., dissenting); the questioning was part of a "routine tax investigation" that occurred before the Service had decided to invoke the criminal process, *see id.* at 4; *id.* at 6 (White, J., dissenting); the questioning was quite brief, hardly intense, and solely for the purpose of getting the interrogee to identify two tax returns and the signatures thereon as his and to consent to the extension of the statute of limitations with reference to each return, *id.* at 3 n. 2; and the interrogee was not in custody for the offense about which he was being interrogated. *Id.* at 2, 4. In the case at bar, by stark contrast, the interrogation occurred in unfamiliar surroundings; it occurred after the officer had decided to charge the Respondent and had arrested him; the interrogation was more extensive than in *Mathis;* and the Respondent was in custody for the very offense about which he was being interrogated. Given the result in *Mathis, Miranda* should, *a fortiori,* be held applicable to the case at bar.

In *Orcozo,* the suspect was awakened in his boarding-house bedroom at 4:00 a.m. by four officers. "From the moment he gave his name, according to the testimony of one of the officers, petitioner was not free to go where he pleased but was "under arrest.'" 394 U.S. at 325. In addition to being asked his name, the suspect was also asked whether he had been at a certain cafe, whether he owned a pistol, and where the pistol was. *Id.* This Court held that *Miranda* was applicable despite the fact that the surroundings were familiar and the interrogation was "very brief." *Id.* at 330 (White, J., dissenting). In the case at bar, by contrast, Respondent was in unfamiliar surroundings and was questioned more extensively.

Mathis and *Orcozo* quite clearly show

that the Court favors a rule-of-thumb approach, as-

sumed to be easily applicable, rather than a detailed inquiry into the coerciveness of the custody in a particular case.

United States v. Hall, 421 F. 2d 540, 544 (2d Cir. 1969), *cert. denied*, 397 U.S. 990 (1970). (Friendly, J., commenting on *Mathis*). These cases also show that the Court's concern in *Miranda* was far broader than the examples it culled from police interrogation manuals. In all respects, therefore, these cases belie Petitioner's argument.

Since *Orozco*, this Court has decided six "custody" cases. In five, it held that there was no custody and that *Miranda* was inapplicable. The five are *Beckwith*, *Mandujano* (plurality opinion), *Mathiason*, *Beheler*, and *Murphy*. In *Beckwith*, the suspect was questioned by Internal Revenue Service agents in the familiar surroundings of his home and office. 345 U.S. at 342, 344. He was allowed to leave the agents in order to dress, *id.* at 343, and was permitted to drive unaccompanied to his office to obtain business records. *Id.* at 344. In *Mandujano*, the suspect was questioned in the presence of impartial observers—grand jurors. 425 U.S. at 579. In *Mathiason* and *Beheler*, the suspect voluntarily went to the police station, was specifically told that he was not under arrest, and, after a brief interview, was allowed to leave. 429 U.S. at 495 *(Mathiason)*; 103 S.Ct. at 3518 *(Beheler)*. Finally, in *Murphy*, the suspect was interviewed in the familiar surroundings of his parole officer's office, 52 U.S.L.W. at 4249, the interview was arranged by "appointment at a mutually convenient time," *id.*, the suspect was not under restraint, *id.*, and he was permitted to leave after the interview. *Id.* The only reasonable inference to draw from these cases is that if, as in the case at bar, a suspect is formally arrested, taken to the unfamiliar environment of a jail, and there interrogated, custody exists and *Miranda* is, therefore, applicable. This conclusion finds strong support from the one post-*Orozco* case in which this Court found

custody to exist, *Estelle v. Smith.* In this case, the suspect was in jail awaiting trial on a capital charge when he was questioned by a psychiatrist designated by the trial court. In holding that the suspect was entitled to *Miranda* warnings, this Court stressed the fact that the suspect was restrained in a jail. 451 U.S. at 466-67. Moreover,

> [t]hat respondent was questioned by a psychiatrist designated by the trial court to conduct a neutral competency examination, rather than by a police officer, government informant, or prosecuting attorney, is immaterial.

Id. at 467. If *Miranda* warnings must be given to a jailed suspect who is questioned by a psychiatrist conducting a neutral competency examination, surely they must be given to an arrested suspect who is questioned in a jail by a police officer. Moreover, if, as in *Smith,* it is immaterial that the interrogator is a court-designated psychiatrist rather than a police officer, then the concerns and objectives underlying *Miranda* and subsequent cases are far broader than Petitioner is willing to admit.

Petitioner's argument is inconsistent with the decisions of this Court delineating the scope of *Miranda,* and should therefore be rejected.

D. Petitioner's Argument Is Inconsistent with the Weight of Lower Court Authority.

The brief of Amicus State of Ohio, at 2-3, cites eight lower court cases rejecting the application of *Miranda* to misdemeanors or traffic misdemeanors. For the opposite view, the only case referred to is the decision below. One might, therefore, be inclined to infer that the decision below is something of a novelty in American law. Precisely the opposite is true, however. It is the argument of Petitioner and Amicus State of Ohio that runs counter to the weight of authority.

Twenty-two jurisdictions have cases that are sufficiently definite to warrant inclusion. Of the twenty-two, fourteen jurisdictions apply *Miranda* to traffic midemeanors; eight do not. The fourteen are the Sixth Circuit, *McCarty v. Herdman,* 716 F.2d 361 (6th Cir. 1983) (the decision below); Arizona, *Campbell v. Superior Court,* 106 Ariz. 542, 479 P. 2d 685 (1971); Colorado, *People v. Ramirez,* 609 P. 2d 616 (Colo. 1980); Massachusetts, *Commonwealth v. Brennan,* 386 Mass. 772, 438 N.E. 2d 60 (1982); Minnesota, *State v. Kinn,* 288 Minn. 31, 178 N.W. 2d 888 (1970) (by implication); New York, *People v. Bartlett,* 82 Misc. 2d 152, 368 N.Y.S. 2d 799 (County Ct. 1975);[4] North Carolina, *State v. Lawson,* 285 N.C. 320, 204 S.E. 2d 843 (1974); North Dakota, *State v. Fields,* 294 N.W. 2d 404 (N.D. 1980); Oregon, *State v. Roberti,* 293 Ore. 59, 644 P. 2d 1104, *on reh.,* 293 Ore. 236, 646 P. 2d 1341 (1982), *pet. cert. filed,* August 20, 1982, No. 82-315; Pennsylvania, *Commonwealth v. Meyer,* 488 Pa. 297, 412 A.2d 517 (1980); Texas, *Newberry v. State,* 552 S.W. 2d 457 (Tex. Crim. App. 1977); Utah, *Holman v. Cox,* 598 P. 2d 1331 (Utah 1979); Washington, *State v. Darnell,* 8 Wash. App. 627, 508 P. 2d 613, *cert. denied,* 414 U.S. 1112 (1973); and Wisconsin, *State v. Bunders,* 68 Wisc. 2d 129, 227 N.W. 2d 727 (1975) (dictum). That these cases are in point is apparent from the fact that every one of them involved, as does the case at bar, a charge of driving while intoxicated.

The eight jurisdictions that do not apply *Miranda* to traffic misdemeanors are the Fourth Circuit, *Clay v. Riddle,* 541 F. 2d 456 (4th Cir. 1976); Delaware, *State v. Bliss,* 238 A. 2d 848 (Del. 1968); Florida, *County of Dade v. Callahan,* 259

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[4] *Bartlett* is one of three lower court decisions addressing the issue. The cases split two to one in favor of applying *Miranda. See People v. McLaren,* 55 Misc. 2d 676, 285 N.Y.S. 2d 991 (Dist. Ct. 1967) (*Miranda* applicable); *People v. Bliss,* 53 Misc. 2d 472, 278 N.Y.S. 2d 732 (County Ct. 1967) (*Miranda* inapplicable).

So. 2d 504 (Fla. App. 1971); Iowa, *State v. Gabrielson,* 192 N.W. 2d 792 (Iowa 1971), *cert. denied,* 409 U.S. 912 (1972) (*Miranda* inapplicable to simple misdemeanor, *i.e.,* any misdemeanor for which the maximum permissible confinement does not exceed 30 days); Louisiana, *State v. Angelo;* 251 La. 250, 203 So. 2d 710 (1967) (any misdemeanor); Missouri, *State v. Neal,* 476 S.W. 2d 547 (Mo. 1972); New Jersey, *State v. Macuk,* 57 N.J. 1, 268 A. 2d 1 (1970); and Ohio, *State v. Pyle,* 19 Ohio St. 2d 64, 249 N.E. 2d 826 (1969), *cert. denied,* 396 U.S. 1007 (1970) (any misdemeanor).[3]

We have excluded from our listing five jurisdictions in which the cases are ambiguous or somewhat off the mark. The five are California, *People v. Ceccone,* 260 Cal. App. 2d 886, 67 Cal. Rptr. 499 (1968) (*Miranda* applicable to traffic stop that escalated into marijuana possession charge); Mississippi, *Capler v. City of Greenville,* 207 So. 2d 339 (Miss.), *cert. denied,* 392 U.S. 941 (1968) (this case, frequently cited as holding against the applicability of *Miranda,* did not involve interrogation or incriminating statements; rather, the court rejected the argument that defendant was entitled to be advised of right to counsel for trial preparation purposes); Nebraska, *State v. Dubany,* 184 Neb. 337, 167 N.W. 2d 556 (1969) (held that defendant was not in custody; implication that *Miranda* would have been applicable with

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[3]The scholarly commentary has been uniformly critical of these cases. *See* J. Israel and W. LaFave, Criminal Procedure—Constitutional Limitations 233 (3rd ed. 1980); C. Whitebread, Criminal Procedures 308-11 (1980); Comment, *Miranda and Minor Offenses,* 14 Ariz. L. Rev. 766 (1972); Note, *Potentiality of Incarceration: A Proposed Standard for the Applicability of Miranda to Nonfelony Offenses,* 52 Ind. L.J. 450 (1977); Comment, *Miranda and Misdemeanors,* 14 Land & Water L. Rev. 521 (1979); Note, *Does Miranda Apply to Traffic Arrests?,* 27 Wayne L. Rev. 193 (1980); 22 Drake L. Rev. 184 (1972); 38 Mo. L. Rev. 652 (1973).

custody); New Hampshire, *State v. Desjardins,* 110 N.H. 511, 272 A. 2d 599 (1970) (same as *Dubany, supra,* but implication is weaker and opinion is ambiguous); and Oklahoma, *Byers v. Oklahoma City,* 497 P. 2d 1302 (Okla. Crim. App. 1972) (*Miranda* held applicable to traffic misdemeanor; in denying City's petition for rehearing, two of three judges said that *Miranda* applies only to those traffic misdemeanors that "form the foundation for a felony charge for a subsequent offense," *id.* at 1305; judges may have been referring to fact that under 47 Okla. Stat. Ann. § 11-902, a second offense DWI is a felony).

From this compilation, it is apparent that Petitoner's argument is contrary to the substantial weight of lower court authority. A decision for Respondent in the case at bar will therefore be less disruptive of state processes than will a decision for Petitioner.

Up to this point, we have been dealing with Petitioner's argument that *Miranda* was concerned only with hard or intense interrogation and should therefore not be applied to traffic misdemeanors. In response, we have tried to show that the argument is contrary to the language of *Miranda;* to the conditions that led to *Miranda,* and the concerns and objectives underlying *Miranda;* to other decisions of this Court delineating the scope of *Miranda;* and to the resolution of the issue in both the lower court cases and scholarly commentary. Now we turn to a miscellany of subsidiary arguments advanced by Petitioner, Amicus State of Ohio, and some of the lower courts.

E. The Miscellaneous Arguments Against Applying *Miranda* to Traffic Misdemeanors Are Meritless.

Petitioner argues that the very fact of intoxication means that a person arrested for driving while intoxicated will not derive much benefit from *Miranda* warnings. Brief for Petitioner at 23. This argument should be rejected out of hand

for a number of reasons. (1) The argument presumes that the arrestee is guilty. (2) Most traffic misdemeanors do not involve intoxication. Thus, the argument is too narrow to support Petitioner's position that Miranda should be inapplicable to all traffic misdemeanors. (3) In many felonies and nontraffic misdemeanors, the arrestee is also intoxicated. Carried one short step, Petitioner's argument would bar *Miranda* in these cases, too, contrary to Petitioner's position. Thus, Petitioner's argument is too broad. (4) In order to derive no benefit from a *Miranda* warning, a person would have to be so grossly intoxicated that he lacks knowledge of, and cannot gain knowledge from, his surroundings. Even if we look only at the universe of intoxicated drivers, such gross intoxication would be rare.

Related to the argument above is one tendered by Amicus State of Ohio that the very fact of intoxication will make it hard for the prosecution to prove that there was a proper waiver of *Miranda* rights, and that *Miranda* should therefore be inapplicable. Brief for Amicus State of Ohio at 18-19. This argument is subject to all of the responses noted above. Moreover, while gross intoxication may defeat waiver, *see People v. Roy,* 49 Ill. 2d 113, 273 N.E. 2d 363 (1971) (State conceded that there had been no waiver), courts are not quick to find such intoxication. *See People v. Moore,* 20 Cal. App. 3d 444, 97 Cal. Rptr. 601 (1971) (blood alcohol readings of .22); *People v. Duke,* 63 Misc. 2d 407, 311 N.Y.S. 2d 312 (App. Div. 1970); *State v. Pease,* 129 Vt. 70, 271 A. 2d 35 (1970) (rejecting argument that, as a matter of law, a blood alcohol reading of .187 negated waiver). Thus, the argument of Amicus is overstated.

Petitioner argues next that it would be confusing to give a *Miranda* warning and then ask the driver whether he will take an intoxication text. Brief for Petitioner at 23. Thus, Petitioner seeks to take advantage of this Court's decision in *South Dakota v. Neville,* ____ U.S. ____, 103 S. Ct. 916 (1983) that *Miranda* warnings need not precede asking a

driver whether he is willing to take the test, and that the prosecution may make evidentiary use of an inculpatory refusal. Petitioner's argument is merely another in a parade of overblown horribles. In actual practice, police frequently give *Miranda* warnings to persons arrested for driving while intoxicated. *See Campbell v. Superior Court, supra* at 695; *Commonwealth v. Brennan, supra* at 62; *State v. Kinn, supra* at 890; *State v. Lawson, supra* at 844; *State v. Fields, supra* at 405; *Holman v. Cox, supra* at 1333. Indeed, in *Neville*—the very case that Petitioner tries to take advantage of—a warning was given. 103 S. Ct. at 918 and n. 1. Although confusion is possible, *Holman v. Cox, supra,* there is no necessary inconsistency between *Miranda* warnings and intoxication tests. *Id.* Confusion can be avoided by the simple expedient of dealing with the intoxication test first, and not engaging in other interrogation until the driver makes a decision about the test. If the officer wants to interrogate after the decision has been made, he must then give *Miranda* warnings.

Petitioner argues further that since, by hypothesis, the driver is intoxicated, any statement he makes is arguably involuntary. Thus, courts will have to examine the totality of circumstances in any event, and the bright-line benefit of *Miranda* will be lost. Brief for Petitioner at 24. This argument, too, is footless. As with some of the arguments above, it presumes guilt, would not apply to most traffic misdemeanors, and would apply to felonies and nontraffic misdemeanors. Moreover, *Miranda* is merely an alternative to the involuntary confession rule; it did not overturn the rule. Any defendant may make both arguments, and no court has ever suggested that arguing involuntariness forfeits *Miranda.*

Amicus State of Ohio, after portraying the social problem of the impaired driver (which we do not question), concludes, at 21, that "the extension of *Miranda* to the impaired motorist context will serve to needlessly expend time during the arrest and processing procedures and provide for a built-

in pre-trial suppression motion regarding the knowing and intelligent waiver of the '*Miranda* warnings.'" Thus, Amicus suggests that applying *Miranda* will impede law enforcement. This argument, of course, does not apply to traffic offenses other than DWI. Therefore, it is too narrow to support Petitioner's position that *Miranda* should be inapplicable to *all* traffic misdemeanors. Putting that to one side, however, the argument is still insubstantial. As noted above, at least fourteen jurisdictions require *Miranda* warnings in traffic misdemeanor cases, including DWI cases. *See* p. 25, *supra*. There is no evidence of which Respondent is aware of a needless expenditure of time and a proliferation of pretrial suppression motions in these jurisdictions. Nor is there evidence that *Miranda* has hampered traffic law enforcement. *Miranda* does not prohibit a police officer from stopping and arresting a suspected motorist, compelling an intoxication test, or alternatively demanding to know whether the driver is willing to take the test and making evidentiary use of an incriminating refusal. Moreover, the required warnings are not triggered merely by custody. As the court below recognized (J.A. 12), *Miranda* applies only in situations of *"custodial interrogations"* which, in traffic cases, are *"rare."* But even if we look only at the universe of custodial interrogations, the fears of Amicus are unfounded. The fact is that *Miranda* has simply not had the baleful effect on law enforcement that many thought it would have. *See* Leiken, *Police Interrogation in Colorado: The Implementation of Miranda*, 47 Denv. L. J. 1 (1970); Medalie, Zeitz & Alexander, *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda*, 66 Mich. L. Rev. 1347 (1968); Seeburger and Wettick, *Miranda in Pittsburg—A Statistical Study*, 27 U. Pitt. L. Rev. 1 (1967); *Faculty Note, A Postscript to the Miranda Project: Interrogation of Draft Protesters*, 77 Yale L. J. 300 (1967); *Project, Interrogation in New Haven: The Impact of Miranda*, 76 Yale L. J. 1519 (1967). *See also* O. Stephens, The Supreme

Court and Confessions of Guilt 169-74 (1973). Although potential for generalization is undercut by problems in sampling and by the lack of comparative data, these studies tend to show that *Miranda* has not significantly affected the rate of confession, crime clearance, and conviction. There is therefore no reason to believe that *Miranda* will unreasonably or adversely affect traffic law enforcement.

The final substantive argument that we address in this portion of our brief concerns the relationship between the right to appointed counsel at trial and the giving of *Miranda* warnings. Although neither the Petitioner nor Amicus State of Ohio has made the argument, at least one case has denied the applicability of *Miranda* on the ground that the suspect would not have had a right to court appointed counsel at trial. *State v. Angelo, supra* at 711. This argument, too, should be rejected.

The most obvious ground for rejection is that, since the offense for which Respondent was taken into custody, and about which he was interrogated, carried a mandatory term of confinement, Ohio Rev. Code §§ 4511.19 (1982), 4511.99(A) (1982), an indigent would be entitled to appointed counsel. *Scott v. Illinois,* 440 U.S. 367 (1979). Thus, the argument is irrelevant to the case at bar. In some other case, however, under *Scott*'s "actual incarceration" standard, an individual about to undergo custodial interrogation might not have the right to appointed counsel at trial. What, if anything, should the officer be required to say in that situation? Our answer is in three parts. The first part is that, since the fifth amendment privilege is applicable to all criminal cases, the officer should, at the very least, be required to advise the suspect of his right to remain silent and of the cost of speaking. The second part of our answer concerns the right to retained counsel. That right is fully applicable to all criminal prosecutions, including even petty misdemeanor cases. L. Herman, The Right to Counsel in Misdemeanor Court 52-53 (1973). Consequently, the officer should also be

required to advise of the right to retained counsel. *Compare* Rule 2(b), Rules of Procedure for the Trial of Misdemeanors Before United States Magistrates. The third part of our answer deals with the right to appointed counsel. What should the officer be required to say if the offense for which the suspect has been taken into custody is *punishable* by confinement? Since *Scott* mandates the appointment of counsel only in cases of actual incarceration, and since the officer cannot know at interrogation whether actual incarceration will be imposed, the only safe course is to require advice about the appointment of counsel. (A second reason for requiring advice will be discussed immediately below.)

Suppose, however, that the unusual arises: that the officer wants to conduct a custodial interrogation about an offense that is not punishable by confinement and for which, therefore, there is no sixth amendment right to appointed counsel under *Scott*. We still urge that the officer be required to advise of the right to appointed counsel. Our reason, applicable also to the situation described immediately above, is that the unavailability of the right to appointed counsel at trial should not control the giving of advice under *Miranda*. To demonstrate this, we briefly compare the right to appointed counsel at trial with the *Miranda* right to appointed counsel. If an indigent properly asserts the right to appointed trial counsel, the state has two alternatives: to provide counsel and go forward with the proceedings, or not to provide counsel and dismiss the charge. As is well known, the state almost always chooses the former and provides counsel. Thus, the right to counsel at trial is truly a right to the services of counsel. By contrast, if a suspect who has received *Miranda* advice asserts the right to appointed counsel, the interrogator also has two alternatives: provide counsel and try to go forward with the interrogation, or not provide counsel and cease the interrogation, as is required by *Edwards v. Arizona*, 451 U.S. 477 (1981). As is well known, the officer almost never provides counsel; rather, the interroga-

tion ceases. Thus, the *Miranda* right to counsel is not really a right to the presence and services of counsel, but is merely a mechanism for cutting off questioning. It is a "limited Fifth Amendment right to counsel," *Miranda v. Arizona*, 384 U.S. at 537 (White, J. dissenting), and does not implicate the sixth amendment. *United Staes v. Mandujano*, 425 U.S. at 581 n. 6. Advising a suspect of the right to appointed counsel simply gives him the opportunity to remain silent if he believes that he is not "competent to deal with the authorities without legal advice." *Michigan v. Mosley*, 423 U.S. 96, 110 n. 2 (1975) (White, J., concurring). Thus, even in a case in which it is clear that the suspect will not be entitled to appointed trial counsel, the officer should be required to give a complete *Miranda* warning in the unlikely event of custodial interrogation.

F. The Line that Petitioner Seeks to Draw Between Traffic Misdemeanors and All Other Offenses or Between Impaired Driving and All Other Offenses Is Arbitrary, Unprincipled, and Unadministrable.

Throughout his brief, Petitioner argues that the entire category of traffic misdemeanors should be excluded from the coverage of *Miranda*. Thus, Petitioner seeks to draw a line between traffic misdemeanors and all other offenses. The "other offenses" comprehend nontraffic misdemeanors and all felonies, whether traffic felonies or otherwise. In the conclusion of his brief, however, Petitioner refers only to "impaired driving" and "impaired motorists." Brief for Petitioner at 26. Thus, Petitioner suggests that the line should be drawn between the offense of impaired driving and all other offenses, including, presumably, even traffic misdemeanors that do not involve impaired driving. This is the same line suggested by Amicus State of Ohio. Neither line should be drawn by this Court.

Although most traffic offenses are misdemeanors, some are felonies. In Ohio, for example, reckless vehicular homicide is a felony. Ohio Rev. Code § 2903.06 (1983). A first offense of negligent vehicular homicide is a misdemeanor, but a subsequent offense is a felony. Ohio Rev. Code § 2903.07 (1983). In North Dakota, first and second offenses of driving while intoxicated are misdemeanors; a third offense, however, is a felony. *Solem v. Helm*, ____ U.S. ____, 103 S.Ct. 3001, 3004-5 n. 4 (1983). See also *State v. Neal, supra*, 476 S.W. 2d 547, 556 (Seiler, J., dissenting) (third offense DWI carries alternate felony punishment in Missouri); *State v. Macuk, supra*, 57 N.J. 1, 268 A. 2d 1, 9 (comparing then existing law of Pennsylvania under which DWI was punishable by confinement for three years). Given these variations, which certainly exist also in other jurisdictions, it is manifestly imprudent to draw a line between traffic misdemeanors and all other offenses. Upon encountering a vehicular homicide or DWI, a police officer will not know whether he is dealing with a felony or a misdemeanor. Thus, he will not know whether *Miranda* warnings are required. Nor would it be sensible to draw a line between impaired motorist offenses and all others. This line would result in *Miranda* warnings not being required in some felony cases, but being required in some misdemeanor cases. Moreover, a police officer often will not be able to determine easily whether a motorist is impaired by intoxicants or drugs or whether the motorist is impaired by some other condition, or whether the motorist is unimpaired. Thus, the officer will again not know whether to give *Miranda* warnings.

Related to these problems is the fact that a traffic misdemeanor investigation for impaired or other improper driving may escalate into an investigation for a more serious traffic offense or for a nontraffic offense. For example, in *Clay v. Riddle*, 541 F. 2d 456 (4th Cir. 1976), a case heavily relied on by Petitioner, see Brief for Petitioner at 8, 17, 21, a DWI

misdemeanor investigation led to a felony charge when it was discovered that the driver was a recidivist who had been barred from driving. Similarly, in *State v. Lewin*, 163 N.J. Super, 439, 395 A. 2d 211 (1978), *cert. denied*, 444 U.S. 906 (1979), a DWI investigation escalated into the more serious misdemeanor of negligent homicide when the victim of an accident died after the interrogation of the driver. See also *United States v. Schultz*, 442 F. Supp. 176 (D. Md. 1977) (investigation for erratic driving led to suspicion of marijuana possession and culminated in a charge of possessing a sawed-off shotgun); *United States v. Hatchell*, 329 F. Supp. 113 (D. Mass. 1971) (investigation for driving the wrong way on a one-way street ripened into a stolen car charge); *People v. Ceccone*, 260 Cal. App. 2d 886, 67 Cal. Rptr. 499 (1968) (investigation for running a red light escalated into charge of marijuana possession). If a line is drawn either between traffic misdemeanors and all other offenses or between impaired driving and all other offenses, the question will inevitably arise whether, and at what point, the investigation shifted from one offense to another, and whether, and at what point, the officer was required to give *Miranda* warnings. Unless the shift or escalation is held to be irrelevant, *see Clay v. Riddle, supra; but cf. Baldasar v. Illinois*, 446 U.S. 222 (1980), the officer will at some point be required to give advice. Thus a new issue—whether the shifting or escalation point had been reached—will be superimposed on *Miranda* doctrine. Moreover, an additional issue will arise: whether the officer used a traffic investigation without *Miranda* warnings as a pretext for investigating another offense that ordinarily would be subject to *Miranda*. This Court and others have been concerned with pretextual arrests in the fourth amendment context. *See United States v. Robinson*, 414 U.S. 218, 221 n. 1 (1973) (traffic arrest not a pretext for narcotics search); *id.* at 238 n. 2 (Powell, J., concurring, suggesting possibility of pretextual arrest in companion case);

see Gustafson v. Florida, 414 U.S. 260, 266 (1973) (Stewart, J., concurring); *Taglavore v. United States*, 291 F. 2d 262 (9th Cir. 1961) (traffic arrest held pretext for marijuana search). The same problem will arise in the *Miranda* context unless the incentive is removed. Requiring *Miranda* advice in all cases of custodial police interrogation will remove the incentive.

Petitioner's argument leaves important questions unanswered. If, as we infer from the bulk of Petitioner's brief, *Miranda* warnings must be given in nontraffic misdemeanor cases, why not in traffic misdemeanors also? If, as we infer from the brief of Amicus State of Ohio, *Miranda* warnings must be given in traffic misdemeanor cases that do not involve impaired drivers, why not in traffic misdemeanor cases that do? Neither Petitioner nor Amicus has even attempted to explain how the exclusion of a category of offenses from *Miranda* can be justified in light of what *Miranda* includes. The lines drawn by Petitioner and Amicus are arbitrary, unprincipled, and unadministrable. They should be rejected by this Court.

Similarly, this Court should reject a line that neither Petitioner nor Amicus has pressed: the misdemeanor-felony line. In a few cases, it has been held that *Miranda* is inapplicable to all misdemeanors. *State v. Angelo*, 251 La. 250, 203 So. 2d 710 (1967); *State v. Pyle*, 19 Ohio St. 2d 64, 249 N.E. 2d 826 (1969), *cert. denied*, 396 U.S. 1007 (1970). This line is subject to all of the criticisms voiced above. Indeed, because it would increase the number of offenses excluded from *Miranda*, it would also increase the number of occasions on which the problems discussed above would materialize. Additionally, there is no uniform definition of felony and misdemeanor. For example, in Ohio, any offense punishable by confinement for more than a year is a felony. Ohio Rev. Code § 2901.02(E) (1983). By contrast, the convicted *misdemeanant* in *State v. Angelo*, *supra*, received confinement for 16 months. Under a misdemeanor-felony line, Angelo would

not be entitled to *Miranda* warnings, but an Ohio suspect, whose offense was punishable by a year and a day, would.

Just as there is no common agreement on the definition of the terms, so there is no common agreement on classifying conduct as misdemeanor or felony. Each state is free to classify as it chooses. Hence, what is a felony in South Carolina may be a misdemeanor in Ohio. Adoption of the misdemeanor-felony line would therefore give *Miranda* different meanings in different states.

Just as the misdemeanor-felony line may vary from state to state, so may it vary within a single state. For example, whether an offense is one or the other in Ohio depends on such variables as the value of property, Ohio Rev. Code § 2913.02(B) (1983); the nature of property, *id.;* the age of the victim, Ohio Rev. Code §§ 2907.05(A)(3) and (B) (1982), 2907.06(A)(4) and (C) (1982), 2907.07(A) and (D) (1982); and the extent of the victim's injuries. Ohio Rev. Code §§ 2903.11(A)(1) and (B) (1983), 2903.13(A) and (C) (1982). See Appendix to this Brief. Given these variables and others mentioned above, such as the offender's prior record, an officer engaged in custodial interrogation often would not know whether he was dealing with a felony or misdemeanor, and thus would not know whether to give advice.

Because the misdemeanor-felony line varies from state to state and is unstable even within a single state, it should be rejected as a basis for delineating the scope of *Miranda. Miranda* should be held applicable to custodial interrogations for all misdemeanors, including traffic misdemeanors.

II. *MIRANDA* WARNINGS MUST BE GIVEN TO A PERSON WHO HAS BEEN STOPPED BY A POLICE OFFICER WHEN THE OFFICER HAS PROBABLE CAUSE TO BELIEVE THAT THE PERSON HAS COMMITTED AN OFFENSE; A REASONABLE PERSON, UNDER ALL THE CIRCUMSTANCES, WOULD NOT FEEL FREE TO LEAVE; AND THE OFFICER IS ABOUT TO INTERROGATE THE PERSON.

The record clearly shows that a police officer observed Respondent's automobile "weaving in and out of its expected lane of travel" (A.1). Consequently, the officer had probable cause to believe that the driver had violated Ohio Rev. Code §§ 4511.33 (1982) (driving within single lane) and 4511.39 (1982) (changing lanes without signalling). Additionally, the officer had reasonable grounds to believe that the driver had violated then-existing § 4511.20 (1982) (negligent operation of a vehicle) (superseded in 1983 by a reckless operation statute bearing the same number). *See* cases collected in *State v. Cichon,* 61 Ohio St. 2d 181, 399 N.E. 2d 1259 (1980). The officer then stopped Respondent's automobile (A.1) under circumstances which, as Petitioner admits, Brief for Petitioner at 16-17, would lead a reasonable person to believe that he was not free to leave. When Respondent got out of his automobile, he needed support to keep himself from falling (A.1). At this point, the officer had probable cause to believe that Respondent had violated Ohio Rev. Code § 4511.19 (1982) (driving while under the influence of alcohol or drugs), and decided to charge the Respondent (A.2). The officer interrogated Respondent without *Miranda* warnings and obtained incriminating statements.

On these facts, the court below apparently concluded that only general, on-the-scene questioning had occurred; that Respondent was not in "custody," within the meaning of *Miranda,* until he was subsequently arrested; and that warn-

ings were not required. With all due respect, we submit that the court below erred. Once a police officer has probable cause to believe that a traffic offense has been committed and stops the driver under circumstances that would lead a reasonable person to believe that he is not free to go, the driver is in "custody," within the meaning of *Miranda,* and should receive warnings before interrogation.

As we have argued in Point I, *Miranda* applies to all offenses, traffic misdemeanors included. *Miranda,* however, is not limited to the police station or jail. *Orozco v. Texas, supra.* Indeed, as the Court noted in *Miranda:*

> By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody *or otherwise deprived of his freedom of action in any significant way.*

384 U.S. at 444 (emphasis added). Moreover,

> the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons *in all settings* in which their *freedom of action is curtailed in any significant way* from being compelled to incriminate themselves.

384 U.S. at 467 (emphasis added). Although the italicized phrases are susceptible to different interpretations, they mean at the very least that the Court intended *Miranda* to be applicable to *some* instances of field interrogation. Kamisar, *"Custodial Interrogation" Within the Meaning of Miranda,* in Criminal Law and the Constitution—Sources and Commentaries 336 (1968); *see State v. Desjardins,* 110 N.H. 511, 272 A. 2d 599, 603 (1970) (dissenting opinion). Delineating those instances is the second major issue raised by the case at bar.

Petitioner argues that all on-the-scene questioning should be excluded from the coverage of *Miranda*. Brief for Petitioner at 13. Petitioner bases his position on a passage from the *Miranda* opinion. As quoted in Petitioner's brief, the passage is as follows:

> Our decision is not intended to hamper the traditional function of police officers in investigating crime. [Citation omitted.].... General on-the-scene questioning of citizens in the fact-finding process is not affected by our holding. *Miranda, supra,* 384 U.S. at 477

Brief for Petitioner at 13. The omitted portion of the quotation, however, is significant:

> When an individual is in custody on probable cause, the police may, of course, seek out evidence in the field to be used at trial against him. Such investigation may include inquiry of persons not under restraint.

The omitted portion strongly suggests that *Miranda* warnings must be given to any person who is "under restraint," even if the restraint occurs on-the-scene and is part of a general inquiry. This interpretation would, however, require *Miranda* warnings prior to interrogation not only in connection with every traffic stop, but also in connection with every *Terry* stop. A *Terry* stop is a seizure of the person within the meaning of the fourth amendment and necessarily involves restraint. *Terry v. Ohio,* 392 U.S. 1, 16, 19 n. 6 (1968). Although it would be principled and consistent with the concerns underlying *Miranda* to require warnings in connection with both kinds of stops, we doubt that the time is ripe for marrying *Miranda* to *Terry,* and we need not go so far to prevail in the case at bar. Instead, we propose the following interpretation of the crucial passage from *Miranda* for cases of field interrogation: (1) The first issue should be whether

the interrogation constitutes "general on-the-scene questioning." If it does, *Miranda* is inapplicable even if some restraint is present. (2) If the interrogation does not constitute "general on-the-scene questioning," the second issue should be whether the interrogee was "in custody or otherwise deprived of his freedom of action in any significant way." If the answer is no, *Miranda* is inapplicable. If the answer is yes, the suspect is undergoing "custodial interrogation" and should be warned. In our view, this analysis is consistent with *Miranda's* concerns and its stationhouse application, and properly accommodates the interests that this Court sought to advance in *Terry*. As will be seen, application of our proposed test to the case at bar compels the conclusion that *Miranda* warnings should have been given prior to the field interrogation of Respondent.

A. Because the Officer Had Probable Cause to Believe that Respondent Had Committed Several Traffic Offenses, His Field Interrogation Did Not Constitute "General" On-the-Scene Questioning

Under our proposed test, the first issue is whether the interrogation of Respondent constituted "general on-the-scene questioning." There can be no doubt that the interrogation occurred on-the-scene (A. 1-2). For many courts that would be enough. *See* cases collected in J. Cook, Constitutional Rights of the Accused—Trial Rights 324 n. 94 (1974). These courts improvidently ignore the word "general," as does Petitioner in the instant case. *See* Brief for Petitioner at 13-15. The word "general" suggests a situation in which a police officer arrives at the scene of a crime but has no reason to believe that any particular person is implicated. It also suggests a situation in which a police officer, although perhaps suspicious, has no reason to believe that a crime has been committed. *See People v. Ceccone*, 260 Cal. App. 2d 886, 67 Cal. Rptr. 499, 503 (1968); *State v. Kinn*, 288 Minn. 31, 178 N.W. 2d 888, 891 (1970); Kamisar, "*Custodial Inter-*

rogation" Within the Meaning of Miranda, in Criminal Law and the Constitution—Sources and Commentaries 335, 364-65 (1968); *see id.* at 381 n. 7. In either situation, a police officer is likely to be less officious, thus less intimidating, in asking questions. On the other hand,

> [t]he more cause for believing the suspect committed the crime, the greater the tendency to bear down in interrogation and to create the kind of atmosphere of significant restraint that triggers *Miranda*....

United States v. Hall, 421 F. 2d 540, 545 (2d Cir. 1969), *cert. denied,* 397 U.S. 990 (1970). Thus, the word "general" plays an important role in *Miranda*'s concern with inherent coercion, and should not be ignored.

In the case at bar, the officer observed traffic offenses; he also observed the offender. When he questioned Respondent, he was not merely trying to ascertain whether an offense had been committed or who was implicated. Although the questioning occurred at the scene, it was not of a putative witness, but of the prime suspect, of a person whom the officer had probable cause to arrest. Under the circumstances, the interrogation can hardly be considered "general."

This conclusion opens the door to the second issue: whether, prior to the questioning, Respondent was "in custody or otherwise deprived of his freedom of action in any significant way."

B. Because a Reasonable Person Would Not Have Felt Free to Leave, Respondent Was "In Custody or Otherwise Deprived of His Freedom of Action in a Significant Way."

The question whether a suspect undergoing field interrogation is "in custody or otherwise deprived of his freedom of action in any significant way" has been much debated.

The cases are collected in the Petition for a Writ of Certiorari in *Oregon v. Roberti,* No. 82-315, and need not be recanvassed here. Various tests have evolved for resolving the crucial issue, and Petitioner criticizes all of them. Brief for Petitioner at 15-17. We agree with many of Petitioner's criticisms, and, to narrow the issue, briefly indicate our areas of agreement. First, we disclaim reliance on any "focus" test. Although probable cause to arrest is important to our analysis, it serves *only* to negate the element of generality in "general on-the-scene questioning." It does not serve the additional function of establishing custody or some other significant deprivation of liberty. Second, we disclaim reliance on any subjective test. The uncommunicated intent of the officer to restrain the subject could hardly have an effect on the suspect. Conversely, the subjective belief of the suspect that he is not free to go is an ill-considered basis for triggering *Miranda,* for the officer has no way of knowing the subject's beliefs. Third, we disclaim reliance on an "arrest" standard, *i.e.,* on a standard that finds custody only after the officer has uttered the magic words of arrest. Under this test, the officer is encouraged to delay uttering formal words of arrest. *See* Brief for Petitioner at 17.

The remaining test is objective: whether, on all the circumstances, a reasonable person would feel that he was not free to leave. This test is fair to suspects, for it will include most cases in which the suspect believes that he is not free to leave. It is also fair to police officers because, acting reasonably, they should know when a reasonable person would feel restrained. An objective test has been adopted by many courts. The First, Second, Fourth, and Ninth Circuits, as well as various state courts, employ an objective standard to determine the issue of custody.[4] The collective purpose of

[4]First Circuit cases providing for objective standard concerning custody: *Podlaski v. Butterworth,* 677 F. 2d 7, 9-10 (1st Cir. 1982); *Borodine v. Douzanis,* 592 F. 2d 1202 (1st Cir. 1979); *Fisher v. Scafati,* 439 F. 2d 307 (1st Cir.), *cert. denied,* 403 U.S. 939 (1971).

the judicial opinions utilizing an objective test is that custody is determined based upon an examination of the objective manifestation of the suspect's deprivation of liberty, rather than on the police officer's unexpressed personal intention. *See* cases collected in Footnote 6.

Petitioner states that "no reasonable person would feel that he was free to ignore the visible and audible signal of a traffic safety enforcement officer," and that no "motorist ordered by a police officer to step out of his vehicle would reasonably or prudently believe that he was at liberty to ignore that command." Brief for Petitioner at 16-17. We agree but Petitioner does not intend his remarks to be a concession; rather he uses them to attack the objective test. Unless we have completely misapprehended the thrust of Petitioner's argument, Petitioner seems to be saying that a perfectly useful and fair test should not be adopted because Petitioner will lose under it. This may be an honest position, but it is hardly a sufficient one.

Given the fairness and wide adoption of the objective test, we urge it on this Court. Under it, as Petitioner is forced to acknowledge, Respondent was "in custody or otherwise deprived of his freedom of action in a significant way." Thus,

---

Second Circuit case adopting objective standard: *United States v. Hall, supra,* at 544-45. Fourth Circuit case adopting objective standard: *Moore v. Ballone,* 658 F. 2d 218, 227 (4th Cir. 1981). Ninth Circuit cases adopting objective standard: *United States v. Booth,* 669 F. 2d 1231, 1236 (9th Cir. 1981); *United States v. Leyva,* 659 F. 2d 118, 120-21 (9th Cir. 1981); *United States v. Estrada-Lucas,* 651 F. 2d 1261, 1266 (9th Cir. 1980); *United States v. Curtis,* 568 F. 2d 643, 646 (9th Cir. 1978); *Lowe v. United States,* 407 F. 2d 1391 (9th Cir. 1969). State court decisions adopting objective test to determine custody: *Commonwealth v. Meyer,* 488 Pa. 297, 412 A. 2d 517, 521 (1980); *Hunter v. Alaska,* 590 P. 2d 888, 895 (S. Ct. of Alaska 1979); *State v. Cassell,* 602 P. 2d 410, 414 (S. Ct. of Alaska 1979); *State v. Morse,* 127 Ariz. 25, 617 P. 2d 1141, 1144 (1980); *State v. Hatton,* 116 Ariz. 142, 568 P. 2d 1040 (1977).

Respondent was entitled to *Miranda* warnings preceding his field interrogation, and the court below properly set aside his conviction. But lest it be thought that we are urging this test only because Respondent will win under it, we hasten to add that the objective test and our earlier "probable cause" argument best accommodate and reconcile the interests underlying *Miranda* with the interests underlying *Terry*. We address that matter immediately below.

C. The Probable Cause—Reasonable Person Test Best Accommodates the interests of *Miranda* and *Terry*

As noted earlier, *supra* at 39, *Miranda* defined custody as it did for the very purpose of requiring warnings in some instances of field interrogation. If custodial interrogation were limited to the police station, "the police would need only to delay formal arrest or physical transfer of the accused to the station house in order to circumvent the constitutional safeguards that *Miranda* dictates." *Commonwealth v. Stites*, 427 Pa. 486, 235 A. 2d 387, 390 (1967). *See also* N. Soble, The New Confession Standards 56-58 (1966). The "probable cause—reasonable person" test removes the incentive.

The test is harmonious with the concerns of *Miranda*. It applies only when four elements are met: (1) the suspect is dealing with a police officer; (2) the officer wants the suspect to "come across" with information and makes his desires known to the suspect (the "interrogation" element of the *Miranda* formula); (3) the officer has probable cause to believe that the suspect has committed a crime, thus increasing the likelihood that the officer will act intimidatingly; and (4) the suspect is unable to avoid the pressure of the first three elements by leaving. None of these elements standing alone would suffice to establish "custody." All of them, taken together, should, for their combined effect significantly inhibits the assertion of the fifth amendment privilege, a core concern of *Miranda*.

The test is also harmonious with *Rhode Island v. Innis*, 446 U.S. 291 (1980). In *Innis*, this Court defined the interrogation element of *Miranda* as "express questioning" or "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Id.* at 301 (footnotes omitted). The latter part of the definition involves an objective test. The test that Respondent proposes for determining custody in the instant case is also objective and thus harmonizes with the test for interrogation.

The test also fully accommodates the values that this Court sought to vindicate in *Terry v. Ohio, supra.* Under *Terry*, a police officer may stop and temporarily detain a person if the officer has a reasonable and articulable suspicion that the person has committed, is committing, or is about to commit a crime. *See Adams v. Williams*, 407 U.S. 143 (1973). Probable cause is not necessary. Because the test that we propose requires probable cause as an element, it will not affect *Terry* stops. A police officer who makes a valid stop may question the suspect without *Miranda* warnings until the officer acquires probable cause to believe that the suspect has committed a crime. At that point, *Miranda* warnings must be given before further interrogation. Although the line between probable cause and reasonable suspicion is somewhat thin, it is a line that the police have worked with for sixteen years and with which they are familiar. They tread the line daily in deciding whether to arrest. They also tread the line every time they decide whether to take a suspect to the police station for interrogation. *Dunaway v. New York*, 442 U.S. 200 (1979). It is therefore fair to ask them to tread it again.

For the reasons stated above we urge this Court to hold that Respondent's field interrogation statements were unconstitutionally obtained.

III. NOT HAVING RAISED THE ISSUE IN ANY COURT BELOW, PETITIONER SHOULD BE PRECLUDED FROM NOW RELYING ON THE HARMLESS ERROR DOCTRINE. IN ANY EVENT, THE ADMISSION OF THE RESPONDENT'S JAIL STATEMENT WAS NOT HARMLESS BEYOND A REASONABLE DOUBT.

In Point III of his brief, Petitioner claims that the admission of Respondent's police station statements was harmless error. The most interesting feature of this claim is that it is now being made for the first time. It was not made at any stage below—not in the Franklin County Court of Appeals (*see* A. 4-8); not in the Federal District Court (*see* A. 10-12); and not in the Sixth Circuit of Appeals (Brief for Respondent, *McCarty v. Herdman*). Most importantly, Petitioner, having lost in the Sixth Circuit, did not include the harmless error issue in his Petition for a Writ of Certiorari. Rather the sole issue raised was whether *Miranda* applied to individuals arrested for misdemeanor traffic offenses.

The case at bar is a habeas corpus case. Those who seek habeas relief must carefully meet standards of procedural regularity. *See Engle v. Isaac,* 456 U.S. 107 (1982). No less should be required of the party opposing relief.

Rule 21(1)(a) of the Rules of the Supreme Court of the United States provides that "Only the questions set forth in the petition or fairly included therein will be considered by the Court." We urge this Court to hold that the harmless error issue is not "fairly included" within the question of whether *Miranda* applies to persons arrested for misdemeanor traffic offenses.

However, even if this Court permits Petitioner to raise the harmless error issue, Respondent should prevail. If this Court holds that all of Respondent's statements are inadmissable, the error was clearly reversible, and Petitioner does

not argue otherwise. Brief for Petitioner at 25. Conversely, if this Court should hold all statements admissible, there would be no error of any sort. Therefore, the harmless error issue arises only on the assumption that Respondent's jail statements are inadmissable, but his field statements are admissible. On that assumption, Petitioner argues that the jail statements "were merely repetitions of [Respondent's] earlier statements." *Id.* Petitioner, however, has misread the record.

The stipulated facts (A.2) show that after Respondent was stopped and "his freedom to leave the scene was terminated," he admitted under interrogation that "he had consumed two beers and had smoked several joints of marijuana a short time before." Respondent thus admitted to use. *Use,* however, was not the gravamen of the offense with which Respondent was charged and of which he was convicted. The essence of that offense is driving *under the influence* of intoxicants. Ohio Rev. Code § 4511.19 (1975). At the jail, Respondent took an intoxilyzer test. Its result—.000—tended to refute that he was under the influence. Then Respondent was asked by the officer whether he was under the influence. His answer, "I guess, barely," supplied evidence of the missing element. Surely, Respondent's statement was not merely a repetition of his earlier statements.

We do not contend that Respondent's jail statement was the only evidence of being under the influence. It was not. There were physical signs of unsteadiness (A. 1,2) and slurred speech (A. 2). But those signs, standing alone, might not have been enough to convict. Respondent's statement that he was under the influence related the physical evidence to the intoxicants. Thus, Respondent's statements directly supplied a link that otherwise would have been left to the vicissitudes of circumstantial evidence. Respondent's statement also made it much harder for him to attribute his unsteadiness to the limp and injured back that he had (*See* Alcohol Influence Report, side 2, J.A. 2, 3). Under the circum-

stances, it can hardly be said that the use of Respondent's jail statement was harmless beyond a reasonable doubt. *Chapman v. California*, 368 U.S. 18 (1967).

CONCLUSION

For the reasons stated above, the decision of the United States Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rule 28.5(b) of the Rules of the Supreme Court, I hereby certify that the requisite number of copies (3) of the foregoing Brief of Respondent have been served upon Petitioner, Harry J. Berkemer, by personal service of such copies to the office of Petitioner's counsel of record, Alan C. Travis, 369 South High Street, Columbus, Ohio 43215, by delivery to counsel for Petitioner or to an employee thereof, this 24th day of March, 1984.

I further certify that all parties required to be served have been served. The Petitioner's name is Harry J. Berkemer, and his address is 370 South Front Street, Columbus, Ohio 43215.

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MISCELLANEOUS OHIO STATUTES

Ohio revised Code (Page's) Section 2903.06, Aggravated Vehicular Homicide (Eff. 3-16-83):

> (A) No person, while operating or participating in the operation of a motor vehicle, motorcycle, snowmobile, locomotive, watercraft, or aircraft, shall recklessly cause the death of another.
>
> (B) Whoever violates this section is guilty of aggravated vehicular homicide, a felony of the fourth degree. If the offender has previously been convicted of an offense under this section or section 2903.07 of the Revised Code, aggravated vehicular homicide is a felony of the third degree.

. . .

Ohio Revised Code (Page's) Section 2903.7, Vehicular Homicide (Eff. 3-16-83):

> (A) No person, while operating or participating in the operation of a motor vehicle, motorcycle, snowmobile, locomotive, watercraft, or aircraft, shall negligently cause the death of another.
>
> (B) Whoever violates this section is guilty of vehicular homicide, a misdemeanor of the first degree. If the offender has previously been convicted of an offense under this section or section 2903.06 of the Revised Code, vehicular homicide is a felony of the fourth degree.

. . .

Ohio Revised Code (Page's) Section 2901.02, Classification of Offenses (Eff. 1-5-83):

As used in the Revised Code:

. . .

(E) Any offense not specifically classified is a felony if imprisonment for more than one year may be imposed as a penalty.

. . .

Ohio Revised Code (Page's) Section 2913.02, Theft (Eff. 1-5-83):

. . .

(B) Whoever violates this section is guilty of theft. If the value of the property or services stolen is less than three hundred dollars, a violation of this section is petty theft, a misdemeanor of the first degree. If the value of the property or services stolen is three hundred dollars or more and is less than five thousand dollars, or if the property stolen is any of the property listed in section 2913.71 of the Revised Code, or if the offender has previously been convicted of a theft offense, a violation of this section is theft, a felony of the fourth degree. If the value of the property or services stolen is five thousand dollars or more, or if the offender has previously been convicted of two or more theft offenses, a violation of this section is grand theft, a felony of the third degree. If the property stolen is a motor vehicle, as defined in section 4501.01 of the Revised Code, a violation of this section is grand theft of a motor vehicle, a felony of the third degree.

Ohio Revised Code (Page's) Section 2907.05, Gross Sexual Imposition (Eff. 8-8-77):

(A) No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons, to have sexual contact when any of the following apply:

. . .

(3) The other person, or one of the other persons, is less than thirteen years of age, whether or not the offender knows the age of such person.

(B) Whoever violates this section is guilty of gross sexual imposition. Violation of division (A) (1) or (2) of this section is a felony of the fourth degree. Violation of division (A) (3) of this section is a felony of the third degree.

. . .

Ohio Revised Code (Page's) Section 2907.06, Sexual Imposition (Eff. 8-8-77):

(A) No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons to have sexual contact when any of the following apply:

. . .

(4) The other person, or one of the other persons, is over twelve but not over fifteen years of age, whether or not the offender knows the age of such person, and the offender is at least eighteen years of age and four or more years older than such other person.

. . .

(C) Whoever violates this section is guilty of sexual imposition, a misdemeanor of the third degree.

Ohio Revised Code (Page's) Section 2907.07, Importuning (Eff. 1-1-74):

(A) No person shall solicit a person under thirteen years of age to engage in sexual activity with the offender, whether or not the offender knows the age of such person.

. . .

(D) Whoever violates this section is guilty of importuning. Violation of division (A) or (B) of this section is a misdemeanor of the first degree. Violation of division (C) of this section is a misdemeanor of the fourth degree.

Ohio Revised Code (Page's) Section 2903.11, Felonious Assault (Eff. 7-1-83):

(A) No person shall knowingly:

(1) Cause serious physical harm to another;

. . .

(B) Whoever violates this section is guilty of felonious assault, an aggravated felony of the second degree. If the deadly weapon that the offender had on or about his person or under his control in violating division [(A)] (2) of this section was a firearm, as defined in section 2923.11 of the Revised Code, the offender shall be

sentenced to a term of actual incarceration of three years and an indefinite term of imprisonment pursuant to division (B) of section 2929.71 of the Revised Code.

Ohio Revised Code (Page's) Section 2903.13, Assault (Eff. 1-1-74):

(A) No person shall knowingly cause or attempt to cause physical harm to another.

. . .

(C) Whoever violates this section is guilty of assault, a misdemeanor of the first degree.

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No. 83-710

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HARRY J. BERKEMER, SHERIFF
OF FRANKLIN COUNTY, OHIO,
Petitioner,

v.

RICHARD N. MCCARTY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF OF PETITIONER

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QUESTION PRESENTED

WHETHER LAW ENFORCEMENT OFFICERS MUST GIVE "*MIRANDA* WARNINGS" TO INDIVIDUALS ARRESTED FOR MISDEMEANOR TRAFFIC OFFENSES. (*MIRANDA* V. *ARIZONA*, 384 U.S. 436 (1966).)

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REPLY BRIEF OF PETITIONER

REPLY ARGUMENT

I. THE TRAFFIC STOP

Respondent's proposed test for custody as a trigger for the prophylactic warnings of *Miranda* v. *Arizona,* 384 U.S. 436, (1966), (probable cause to believe a traffic safety offense has taken place coupled with a traffic stop, Brief of Respondent, at 38) is totally unworkable in the context of highway safety law enforcement. Although disclaiming reliance on "focus" as a standard, (c.f. *Escobedo* v. *Illinois,* 378 U.S. 478

(1964)), respondent urges that probable cause plus a traffic safety stop amounts to the *type* of custody envisioned by the *Miranda* Court. Respondent reasons that Trooper Williams was required to advise him of his *Miranda* rights prior to asking respondent if he had been drinking. Respondent's proposed test for custody is not only unworkable but would require rejection of long-standing principles of the law of arrest and would have totally undesirable effects in the context of highway safety law enforcement.

First, without replication of the various passages underscoring the type of custody that was the concern of the *Miranda* Court, a highway safety stop is simply not the type of coercive, oppressive atmosphere that was thought to overbear the will of the incommunicado arrestee. Suffice it to say that the *Miranda* Court was concerned with what was perceived to be "overzealous police practices", and "menacing police interrogation procedures" designed to put a defendant in "such an emotional state as to impair his capacity for rational judgment". 384 U.S. at 444, 457, 456. In marked contrast, the routine daily enforcement of highway safety laws, experienced at some time by virtually everyone who holds a driver's license, presents no such potential for police abuse.

Respondent's proposal that in conjunction with the traffic stop, probable cause should trigger *Miranda* warnings would require a considerable shift in the law of arrest.

> "Police are not required to guess at their peril the precise moment at which they have probable cause to arrest a suspect, risking a violation of the Fourth Amendment if they act too soon, and a violation of the Sixth Amendment if they wait too long."
> *Hoffa* v. *United States,* 385 U.S. 293 at 310 (1966).

Respondent's proposal would engraft the prophylactic rule of *Miranda* to the foregoing analysis. Respondent's propos-

ed test would require re-evaluation of the Court's recent pronouncements on the meaning of the term "in custody" for *Miranda* purposes. See *Oregon* v. *Mathiason*, 429 U.S. 492 at 495 (1977) and *California* v. *Beheler*, ____ U.S. ____, 103 S. Ct. 3517 at 3520 (1983).

Finally, respondent's proposal that "*Miranda* warnings" are required in a traffic safety stop, would serve to criminalize and alienate the millions of otherwise law abiding citizens who travel our nation's highways on a daily basis. Under respondent's proposed test, a traffic safety officer investigating a minor automobile collision which involves some traffic law infraction, would be required to advise each motorist of his or her various rights. It is no extravagance to visualize the feelings of alienation and criminalization which would be experienced by the average citizen involved in an automobile accident if the traffic safety officer began to formally intone the driver's various "rights". Moreover, upon being so-advised, a motorist would hardly feel free to make any statement regarding the circumstances of the auto collision. Such result would frustrate the normally simple task of determining the cause of the collision and either require the employment of accident investigation squads with attendant disruption of traffic flow or abandonment of the investigation. The undoubted result of the latter would be increased civil litigation to determine fault and liability.

In the context of the questioned applicability of the prophylactic rule of *Miranda* to the everyday world of traffic safety law enforcement, the traditional tests of custody are unworkable. Expansion of the judicially crafted rule to the highway safety setting is not justified by any rational view of that decision and would work an unreasonable result in practice. Any marginal advancement of traditional Fifth Amendment values which might be gained by expanding *Miranda* precepts to the highway safety setting are far outweighed by the very clear negative effect which would be wrought.

II. THE IMPLIED CONSENT TEST AND ALCOHOL INFLUENCE REPORT

Petitioner has argued that the *pro forma,* line-item inquiries of respondent, contained in the alcohol influence report completed after the implied consent test, should not be subject to the strictures of the *Miranda* decision. Petitioner has also argued that due to the unique nature of the offense of impaired driving, the rigidity and simplicity of the prophylactic rule fashioned by the *Miranda* Court would have little utility for lower courts in the case of an individual impaired by alcohol or other chemical substances.

Respondent argues that he was arrested, taken to jail and interrogated about the offense. (Brief of Respondent, at 5.) Amici in support of respondent assert that a motorist is "compelled to accompany police for questioning." (Brief of Amici, American Civil Liberties Union and American Civil Liberties Union of Ohio, at 5.) Both respondent and his supporting amici misperceive the nature and purpose of respondent's presence at the testing facility.

Understandably, respondent stresses that the location to which he was transported for the statutory implied-consent test was the Franklin County jail. At the time of respondent's traffic offense, state law mandated that the impaired driver be advised of the consequences of refusal to submit to the test "at a police station". (Ohio Revised Code, Section 4511.191(C), Brief of Petitioner at 30.) Subsequently, the Ohio General Assembly amended that section to include a hospital, first-aid station or clinic to which the motorist has been taken for first-aid. Transport to a specific location is necessitated both by the fact that machines capable of testing for alcohol can not readily or economically be placed in every highway safety officer's vehicle, and by the statutory requirement that the implied consent form must be read to the impaired driver in the presence of one

other police officer or employee who must then sign as a witness. *Ibid.*

The primary failing of respondent's brief before this Court is that it neglects to discuss, or even acknowledge, that the offense of operating a motor vehicle while under the influence of either alcohol or other chemical substances, is different in kind from other crimes. As such, the impaired driving offense simply does not lend itself to a reasoned or practical application of prophylactic *Miranda* warnings. Unlike any other offense, the officer must take a suspected impaired motorist into custody, i.e., the offender must be conveyed to a facility wherein a chemical test can be administered.[1] Moreover, of necessity, the highway safety officer must engage in some form of questioning of the motorist at least to ascertain whether he will accede to a chemical test.

Respondent expresses concern that the *pro forma* line-item alcohol influence report has the potential for mischief and might be expanded by a clever officer into a far reaching inquiry or might lead to the discovery of evidence of another offense. Respondent counsels rejection of a bright-line approach, urging that officers will not know at which point an investigation shifts from a traffic offense to another matter and will not know when to give *Miranda* warnings. (Brief of Respondent, at 35.) Later in his brief, addressing the traffic stop, respondent urges (inconsistently, we believe) that police are fully capable of making the fine line determination of when reasonable suspicion has ripened into probable cause for arrest. (Brief of Respondent, at 46.) Respondent's argument should be rejected.

The minimal inquiry of respondent to complete the alcohol influence report is neutral in terms of any other of-

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[1]Implied consent statutes aside, no rational person has ever suggested that persons in a state such as that evidenced by respondent, should simply be permitted to drive away. The record clearly demonstrates that respondent represented a clear and present danger both to himself and all other motorists on the state's highways.

fense. There is no provision therein regarding unrelated matters. Officers will readily comprehend that should they feel inquiry into other matters is warranted or necessary, or if the subject begins to speak regarding other offenses, either *Miranda* advice would precede further inquiry or, if the level of intoxication through alcohol or drug impairment is great, the officer will know to await sobriety before administering *Miranda* advice and proceeding further.[2]

Moreover, the lower courts are fully capable of dealing with any mischief occasioned by an overzealous officer's attempt to expand upon the limited information sought. Petitioner has pointed out that unlike detectives engaged in criminal investigations, the typical traffic safety officer must return to patrol duty as rapidly as possible. (Brief of Petitioner, at 20, 21 and see recommendations of the Presidential Commission on Drunk Driving cited by Amicus, the State of Ohio, at 21.)

Courts will be equally adept at discerning the line of demarcation between the *pro forma,* limited inquiry of the impaired driver, which would be admissible in the traffic safety case and any inquiry sought to be introduced in a prosecution for a separate offense. Thus, contrary to respondent's fears, a bright-line decision admitting the alcohol influence report in the prosecution of the impaired driver without pre-existing "*Miranda* advice", while excluding its use for any other prosecution, will be readily understood and applied by law enforcement and courts alike.

Moreover, the unique nature of the case of the impaired driver is in stark contrast to the typical investigation of other offenses. Any responsible police detective seeking to question a custodial suspect regarding any other crime will first

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[2]As argued by petitioner, due to the unique nature of the impaired driver, even with *Miranda* advice, the question of voluntariness, whether for the traffic offense of drunken driving or in the context of a separate prosecution, will have to be addressed by trial courts in any event. (Brief of Petitioner, at 23-24.)

inquire as to the suspect's age, educational background, and ability to read to determine whether the suspect has the capacity to appreciate his "*Miranda* rights". Almost universally, this preliminary inquiry will include the question of whether the suspect has ingested alcohol or other chemical substances. In contrast, extension of *Miranda* to the impaired driver would preclude this very inquiry into the suspect's ability to comprehend *Miranda* warnings as the preliminary inquiry is directed to the offense itself. To apply *Miranda* strictures under these circumstances would require adoption of a paternalistic rule that no statement of an impaired driver may be admitted, despite clear indicia of voluntariness in the traditional sense. Absent incompetence, this Court has never taken that position. (See *Michigan* v. *Mosley*, 423 U.S. 96, at 108-109 (1975) (White, J., concurring.)) This anomalous result alone, is sufficient reason to decline respondent's invitation to expand the *Miranda* doctrine.[3]

Moreover, in respondent's case, the very fact of respondent's behavior in light of the completely negative result of

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[3]In point of fact *every* question posited to an impaired driver is potentially incriminating no matter how facially innocuous. If an impaired motorist cannot accurately answer such wholly neutral questions as what is your date of birth, are you married, what is your address, where are you employed, when did you last eat or sleep, or where were you stopped, such inability is in itself material and will be utilized by the prosecution in any ensuing trial for driving under the influence. Indeed, examination of the alcohol influence report, herein, demonstrates that respondent neither knew the date or the day of the week on which he was arrested, i.e. respondent stated that it was Sunday, March 28, 1980, when it was in reality Monday, March 31, 1980. (JA 2,3). Taking respondent's argument to its logical conclusion would require that the court abrogate the recognized exception from *Miranda* strictures for those words normally attendant to arrest and custody. See *Rhode Island* v. *Innis*, 446 U.S. 291 at 301 (1980).

the blood-alcohol test, mitigates in favor of *pro forma* inquiry of the type normally associated with arrest or booking procedures. Clearly, respondent was unable to function behind the wheel of an automobile. His slurred speech, drowsiness, and inability to stand without aid would require any conscientious person charged with the responsibility of his well being to inquire further.

It is beyond question that an arrestee is entitled to a reasonable degree of care from his custodian. It would have been the height of irresponsibility had respondent been ushered to the door following the blood-alcohol test which indicated no blood-alcohol content and left to his own devices. Equally irresponsible would be the custodian who failed to make normal inquiries into the cause of such person's otherwise inexplicable behavior. Typically, any arrestee booked for a criminal offense will be asked not only his name, address, social security number and other identifying information, but also whether he is under a doctor's care, requires or has taken, medication or other drugs. Words normally attendant to arrest and custody are not the type of questioning envisioned by the *Miranda* Court. See *Rhode Island* v. *Innis,* 446 U.S. 291 at 301 (1980). Should the arrestee exhibit unusual behavior (as did respondent) and the custodian fail to make reasonable inquiry, resultant injury, illness or death would undoubtedly be followed by a civil damage action or proceedings under Title 42 United States Code Section 1983.

The synergistic effect of combining various chemical substances is well documented. For example, the widely abused drug methaqualone, commonly known as quaalude or sopor, typically produces drowsiness in clinical dosage. When taken in an overdose, the drug may result in delirium and coma progressing to convulsions, pulmonary edema and cardiac or respiratory arrest.

"The patient should be warned about the possible addi-

tive effects when methaqualone is taken concommitantly with other central nervous system depressants such as alcohol or barbiturates."
Physician's Desk Reference to Pharmaceutical Specialties and Biologicals, Medical Economics Company, Oradell, New Jersey (1982), at 1074-1075.

Commonly prescribed minor tranquilizers such as Librium and Valium are equally dangerous when taken in conjunction with alcohol or other central nervous system depressants. (*Ibid.*, at 1599, 1625.) While adverse reaction to these chemicals normally includes drowsiness and similar states, the paradoxical reactions of hyperexcitement, hallucinations, and acute rage are also noted. (*Ibid.*, at 1599, 1625.) Faced with otherwise inexplicable behavior typified by adverse reaction to chemical substances described above and without knowledge of the substance or substances ingested, a physician employed by the custodial facility may well utilize a fatally incorrect remedial measure thus subjecting the governmental entity to civil liability. No one has suggested that these *pro forma* inquiries attendant to the booking process should be preceded by prophylactic *Miranda* warnings. Clearly, these inquiries are not the type of investigative interrogation contemplated by the *Miranda* Court. Equally reasonable is the *pro forma,* line-item inquiry of the alcohol influence report form. (JA 2) The regulated, limited questions and respondent's answers filled in by Trooper Williams are not the form of interrogration contemplated by the *Miranda* Court. The form could well have been filled out by a clerical employee, leaving the traffic officer free to return to his highway safety patrol. In point of fact, expediting the booking process was among those recommendations of the Presidential Commission on Drunk Driving. (See Brief of Amicus, the State of Ohio at 21.)

III. APPLICATION OF THE RULE OF HARMLESS ERROR

Petitioner has urged that if, contrary to petitioner's submission, the Court should find the brief, *pro forma* inquiries of the alcohol influence report form following the implied consent test, create the same type of coercive custodial interrogation atmosphere found offensive in *Miranda* and thus, extend that holding to highway safety arrests, admission of McCarty's statements included in the report falls within the harmless error rule. *Chapman* v. *California,* 386 U.S. 18 (1967). Respondent urges that the question of harmless error is not fairly subsumed in the question presented and was not urged by petitioner in the courts below.

Although this Court is not required to review the record to evaluate a harmless error claim, the Court has the authority to do so. See *United States* v. *Hasting,* ____ U.S. ____, 103 S. Ct. 1974 (1983).[4] The dissent below expressly addressed the issue of harmless error under *Chapman, supra.* Implicit, therefore, in the majority decision is a rejection of harmless error. Thus, the issue was ruled upon. Petitioner believes the question of harmless error is fairly subsumed in the question presented despite the fact that it was not specifically addressed in the petition. (See Rule 21.1(a) and Rule 34.1(a).)

Respondent urges that his statement, "I guess, barely", in response to the inquiry of whether he felt he was under the influence of an alcoholic beverage, should not fall within the harmless error rule. (Joint Exhibit, Alcohol Influence Report, JA 2.) Respondent argues that he exhibited signs of unsteadiness and slurred speech and that the statement "I guess, barely," was significant to his conviction. (Brief of Respondent, at 48.) Actually, respondent exhibited much more than signs of unsteadiness. Respondent was "falling" and "had to be held up from falling down." (Alcohol Influ-

[4]The Court has before it, the identical record reviewed by the Court of Appeals below. *Ibid.*, 103 S. Ct. at 1981, n. 8.

ence Report, JA 2.) Respondent's speech was "very slurred" and "very hard to understand". (*Ibid.*, JA 2 and Stipulation, Appendix to Petition, A 2.) At the scene of the traffic stop, respondent stated he had consumed "two beers and had smoked several joints of marijuana a short time before". (Stipulation, Appendix to Petition, A 2.)

The dissent below correctly categorized the statement in the alcohol influence report as "essentially repetitious confession evidence." (Opinion below, JA 14.) Therefore, assuming *arguendo,* error, admission of the "essentially repetitious" statement was harmless error. c.f. *Milton* v. *Wainright,* 407 U.S. 371 (1972).

CONCLUSION

Custodial questioning inherent in highway safety law enforcement is demonstrably different from the incommunicado investigative interrogations found coercive by the *Miranda* Court and is not within the contemplation of that decision. Respondent's proposed test for custody in highway safety stops would require that *Miranda* warnings be given at the moment that any highway safety officer stopped a motorist for a traffic infraction, an extravagant extension of *Miranda* which would be both unworkable and would trivialize the precepts of that decision.

The traffic safety offense of impaired driving, whether by alcohol or other chemicals, is different in kind from any other offense. *Pro forma,* line-item inquiries restricted to the subject of the impaired driver are not the form of interrogation envisioned by the *Miranda* Court. The balance struck by the *Miranda* Court is inapplicable in the context of highway safety enforcement in general, and to impaired motorists specifically.

Wherefore, the judgment of the court below should be reversed.

Respectfully submitted,
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CERTIFICATE OF SERVICE

Pursuant to Rule 28.5(b) of the Rules of the Supreme Court, I hereby certify that the requisite number of copies (3) of the foregoing Reply Brief of Petitioner have been served upon respondent, Richard N. McCarty, by personal service of such copies to the office of respondent's counsel of record, R. William Meeks, 503 South High Street, Columbus, Ohio 43215, by delivery to counsel for respondent, or to an employee thereof, this 6th day of April, 1984.

I further certify that all parties required to be served have been served. The respondent's name is Richard N. McCarty, and his address is 529 Erickson, Columbus, Ohio 43213.

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No. 83-710

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HARRY J. BERKEMER, SHERIFF
OF FRANKLIN COUNTY, OHIO,

Petitioner,

v.

RICHARD N. McCARTY,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF *AMICI CURIAE*
AMERICAN CIVIL LIBERTIES UNION
and
AMERICAN CIVIL LIBERTIES UNION OF OHIO

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Interest of Amici Curiae

The American Civil Liberties Union is a nationwide, non-partisan organization of over 250,000 members, dedicated to preserving the liberties guaranteed in the Bill of Rights. The ACLU of Ohio is one of its state affiliates.

The ACLU has frequently appeared before this and other courts to defend the procedural rights this Court has recognized to give life to Fifth and Sixth Amendment guarantees. We appear amici curiae here, with the consent of the parties* because the arguments submitted here by petitioner severely threaten to erode those rights.

*Letters of consent are being lodged with the Clerk directly by the parties.

SUMMARY OF ARGUMENT

The requirement for Miranda warnings is controlled by the custodial nature of the interrogation rather than the nature of the offense charged.

ARGUMENT

WHETHER MIRANDA WARNINGS WERE IN ORDER CORRECTLY TURNED ON THE CUSTODIAL NATURE OF THE INTERROGATION AND NOT ON THE NATURE OF THE OFFENSE IT PROBED

Almost two decades ago this Court expressed its concern that the due process voluntariness criterion, when applied to "incommunicado interrogation of individuals in a police-dominated atmosphere" too often is handicapped by vague, elusive and therefore indefinitive "totality of circumstances" considerations.[1] Responding to this concern, in Miranda v. Arizona, 384 U.S. 436 (1966), it formulated a per se alternative of "procedural safeguards" to

1/ For critical analyses bearing on this subject, see Kamisar, Police Interrogation and Confessions, Essays in Law and Policy (U. of Mich. Press, 1980).

protect the privilege against self-incrimination during "custodial interrogation". Since then, absent the prescribed admonitions conerning the right to silence, the right to counsel and the consequences of a waiver, statements elicited from an accused cannot be used at trial.

Nowhere does Miranda suggest that the requirement for such warnings is to hinge upon the nature of the charge. Unmistakably its focus is on the fact that the interrogation has taken place in a custodial setting, in the present case the stationhouse to which the arrestee was brought. Thus, explicitly encompassed is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of freedom of action in any significant way." Id. at 477; see, also, Orozco v. Texas, 394 U.S. 324, 327 (1969); Mathis v. United States, 391 U.S.1 (1968); cf. Oregon v. Mathiason, 429 U.S. 492 (1977).

Nonetheless, petitioner today urges the Court to carve out an exception to this easily understood

"bright-line" rule. In particular, it would not have the Court enforce Miranda where a traffic violation, albeit here one carrying a mandatory term of imprisonment (Ohio Rev. Code §§4511.19 [1982], 4511.99 [A] [1982]), is the cause of the custody. But, while it cannot be gainsaid that a small minority of lower courts have so ruled (see Respondent's Brief, pp. 18-20), the relevant decisions of this Court, as the Massachusetts Supreme Judicial Court recently observed, do not support such a distinction. Commonwealth v. Brennan, 386 Mass. 772, 438 NE2d 60, 63 (1982); see, also, Lewin v. New Jersey, 444 U.S. 905, 906 (1979) (White, J., dissenting from denial of certiorari); Police Interrogation - - Traffic Offense, Ann. 25 A.L.R.3d 1076 (collecting cases); see, generally, L. Herman, The Right to Counsel in Misdemeanor Court 8 (1973).

In any event, the heart of petitioner's thesis that traffic stops are too commonplace to allow for invocation of Miranda's protective ambit does not stand up, precedentially or logically:

Thus, in Delaware v. Prouse, 440 U.S. 648

(1979), the Court considered, and emphatically rejected, the notion that motorists somehow are stripped of constitutional rights on account of that status alone. Granting the interest claimed by petitioner here, i.e., a State's "vital interest" in safe highways, Delaware declared that, absent random systematic spot checks or an articulable basis, "stopping an automobile and detaining the driver in order to check his driver's license and registration of the automobile are unreasonable under the Fourth Amendment."

No more convincing, we suggest, is petitioner's blurring of the legal and practical distinction between a routine on-the-scene inquiry of a motorist stopped for a traffic infraction and an occasion on which the allegedly erring motorist is compelled to accompany the police for questioning. In the latter event, the motorist necessarily faces the coercive stress that not uncommonly inheres in the combination of a forced loss of freedom, its deprivation at the hands of those whose very badges, guns and uniforms are calculated

to create control and induce submission and, finally, as here, removal to the unfamiliar, if not completely private, surroundings inhabited by the police.

And all the more may this be so with a motorist for whom, since she or he will rarely be a case-hardened criminal, this nearly always will be a first experience with custodial interrogation. As like as not, such an individual is bound to be too passive to appreciate and exercise his or her constitutional rights. See, Project, Interrogations in New Haven: The Impact of Miranda, 76 Yale LJ 1519, 1554 (1967). It is significant then, as Respondent's Brief so well indicates, that the influence of Miranda has proved both workable and salutary.

In sum, the history and spirit of Miranda and the experiential facts which gave it life make clear the requirement that whether its warnings must be employed is not to be determined by the nature of the offense but by the nature of the interrogation. Clay v.

Riddle, 541 F.2d 456, 459 (4th Cir. 1976) (Butzner, J., dissenting).[2]

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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2/ In like vein, model codes now require the administration of warnings "as promptly as reasonable under the circumstances * * * [when] a detained or arrested person * * * is to be removed from the scene." Uniform Rules of Criminal Procedure, Rule 212(b); see, also, ALI Model Code of Pre-Arraignment Procedure, §120.8 (Official Draft #1, 1972). The test is clear and easily understood. There is no reason to jettison it.

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v.

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Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF AMICUS CURIAE STATE OF OHIO IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

WHETHER LAW ENFORCEMENT OFFICERS MUST GIVE *"MIRANDA* WARNINGS" TO INDIVIDUALS ARRESTED FOR MISDEMEANOR TRAFFIC OFFENSES. (*MIRANDA v. ARIZONA,* 384 U.S. 436 (1966).)

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CASE NO. 83–710

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

HARRY J. BERKEMER, SHERIFF
OF FRANKLIN COUNTY, OHIO,
Petitioner,

v.

RICHARD N. McCARTY,
Respondent.

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

BRIEF OF AMICUS CURIAE STATE OF OHIO IN SUPPORT OF PETITIONER

The State of Ohio, by and through the Attorney General of Ohio, pursuant to Rule 36.4, Rules of the Supreme Court of the United States, respectfully submits this brief as Amicus Curiae in support of the petitioner.

INTEREST OF AMICUS CURIAE

The State of Ohio is primarily entrusted with enforcement of highway safety violations occurring within its borders. As is the case in all states, the most serious problem confronted in highway safety enforcement is

that of the impaired motorist. In 1982, the State of Ohio recorded 48,237 convictions for the offense of driving under the influence. Another 49,687 convictions were entered for the offense of reckless operation and a high percentage of these convictions were plea bargained reductions from charges of impaired driving. Alcohol abuse alone accounted for 42 percent of the 1982 traffic fatalities which occurred in the State of Ohio.[1] The legacy of carnage occasioned by impaired motorists is a national disgrace and continues to escalate despite the concerted efforts of highway safety officers and the concomitant massive expenditure of judicial resources.

The issue before this Court is whether the prophylactic rule enunciated in *Miranda v. Arizona,* 384 U.S. 436 (1966), should be extended so as to encompass the pro forma questions propounded by a highway safety officer to a motorist arrested for impaired driving. In the nearly two (2) decades since the advent of the *Miranda* decision, the State of Ohio has never required the "Miranda warnings" in such a setting. *State v. Pyle,* 19 Ohio St. 2d 64, 249 N.E. 2d 826 (1969), *cert. denied,* 396 U.S. 1007 (1970). This view is not unique to Ohio and has been adopted by other states. *See e.g., State v. Neal,* 476 S.W. 2d 547 (Mo. 1972); *State v. Gabrielson,* 192 N.W. 2d 792 (Iowa 1971), *cert. denied,* 409 U.S. 912 (1972); *State v. Lewin,* 163 N.J. Super. 439, 395 A. 2d 211 (1978), *cert. denied,* 444 U.S. 906 (1979);

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[1] This figure undoubtedly understates the actual percentage of fatalities attributable to impaired motorists. This is due to incomplete reporting by law enforcement agencies and the fact that the figure is limited to alcohol related fatalities and thereby fails to encompass deaths caused by motorists under the influence of other chemical substances, e.g., marijuana, LSD, PCP, narcotics, barbiturates, or other mood altering chemicals.

Capler v. City of Greenville, 207 So. 2d 339 (Miss. 1968), *cert. denied*, 392 U.S. 941 (1968); *State v. Angelo*, 251 La. 250, 203 So. 2d 710 (1976); *State v. Bliss*, 238 A. 2d 848 (Del. 1968). At least one federal circuit court has embraced this analysis. *Clay v. Riddle*, 541 F.2d 456 (4th Cir. 1976).

The opinion of the court below in *McCarty v. Herdman*, 716 F.2d 361 (6th Cir. 1983), effectively overrules the decision of the Supreme Court of Ohio in *State v. Pyle, supra*, and thereby alters long standing practices employed by the State of Ohio in seeking to curb the epidemic of impaired drivers. The State of Ohio thus has a substantial interest in the resolution of the question presented in this case.

SUMMARY OF ARGUMENT

A. The decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), was predicated upon the view that recitation of the prophylactic "Miranda warnings" prior to police interrogation of an incommunicado felony suspect was an additional safeguard necessitated by the psychological pressures inherent to such custodial interrogation. The coercive evils perceived in *Miranda* are foreign to the routine and pro forma inquiries made by a highway safety officer to a motorist arrested for impaired driving. To extend the *Miranda* decision to such a commonplace setting is to divorce the decision from its analytical underpinnings and thereby escalate the "Miranda Warnings" from additional safeguards tailored to a perceived abuse into a constitutional imperative arising independent of the rationale which gave rise to their judicially crafted existence. The traditional voluntariness test can adequately ensure Fifth Amendment values in the im-

paired motorist context and should govern the admissibility of statements made by such drivers.

B. The nature of the contact between a highway safety officer and a motorist arrested for impaired driving preempts any reasoned practical application of the *Miranda* decision to such encounter. None of the three (3) views as to when "custody" attaches can rationally accommodate the nature of the contact. The subjective intent of the officer standard was repudiated by the *Miranda* decision itself. The reasonable man test is both unworkable and disingenuous as any reasonable person forced to halt and exit his vehicle and thereupon perform a field sobriety test will perceive himslef to be "in custody" insofar as a layman perceives that concept. The formal arrest standard is a blatant judicial fiction as it elevates form over substance and allows for the admission of the motorist's statements contingent only upon the timing of the highway safety officer's formal articulation of arrest and thus only encourages the officer to delay the rote incantation of a fact known both to himself and the detained motorist.

The implied consent statutes almost uniformly promulgated by the states serve to further frustrate a reasoned application of the *Miranda* decision. Such statutes actually mandate that a highway safety officer take an impaired motorist into custody for the purpose of conveyance to a facility wherein a chemical test can be administered. The "testimonial" or "communicative" distinction drawn by this Court in *Schmerber v. California*, 384 U.S. 757 (1966), is not readily explainable to a lay person. An arrested motorist whose thought processes are chemically impaired will surely experience no small confusion if informed that he need not answer any questions and, in the same breath, is asked whether he

will submit to a chemical test. The operation of an implied consent statute requires both custody and a modicum of verbal intercourse between a highway safety officer and a motorist arrested for impaired driving. The prophylactic rule fashioned in *Miranda* is simply impracticable in such circumstances.

Advocates and detractors alike have conceded that, in the felony interrogation context, the *Miranda* decision provides a "bright-line" rule whereby interrogating detectives may conform their conduct and reviewing courts are more easily able to assess the admissibility of custodial statements. Even this "bright-line" benefit is lost in the setting of an impaired motorist. The *Miranda* decision requires not only the rote recitation of the warnings promulgated therein, but a knowing and intelligent waiver of such warnings. 384 U.S. at 475, *citing, Johnson v. Zerbst,* 304 U.S. 458 (1938). An impaired driver arrested upon probable cause has already demonstrated that he is incapable of performing the relatively simply task of operating a motor vehicle. Depending upon the degree of his chemical impairment, the motorist may not be capable of performing even the most basic physiological functions such as standing without support or talking without a gross slurring of speech. It is a formidable, if not impossible, task to demonstrate that such motorist was sufficiently possessed of cognitive faculties to meet the waiver standard articulated in *Miranda.* Rigid application of *Miranda* thus ends in the anomalous result that probative and reliable statements made by an impaired motorist are kept from the trier of fact due to the very nature of the offense itself. In such circumstances, the *Miranda* decision is transformed from an additional safeguard ensuring Fifth Amendment values into a rule precluding admission of any statement without regard to its voluntary origin.

C. Impaired drivers are, in terms of preventable tragedy, this nation's single most prevalent cause of human suffering. Excluding entirely other types of chemically impaired motorists, drunk drivers alone occasion an almost incomprehensible legacy of carnage. The statistics compiled by the United States Department of Transportation for the calendar year 1982 reflect that alcohol impaired drivers resulted in 28,000 deaths, 670,000 injured persons, 2,600,000 lost work days, 2,500,000 damaged vehicles, and an aggregate financial inpact of 24 billion dollars. Drunk driving has become the leading cause of death nationwide among persons between 15 to 24 years of age. In the past ten (10) years, fully one quarter of a million Americans have died as a consequence of alcohol impaired driving. The Department of Justice figures reflect that during that same ten (10) year period, driving under the influence arrests have actually *increased* by 44.7 percent. In the same decade, arrests of persons under eighteen (18) years of age have increased by 96 percent. Among female drivers in that age bracket the increase has been a staggering 234.4 percent. Nationally in 1982 some 1,778,400 arrests were made for driving while under the influence. This figure accounts for literally two percent of all licensed drivers in the United States. The states and their political subdivision must wrestle with the impaired driver on a daily basis. To date, the states have, despite enhanced public awareness and increased legislative sanctions, been unable to stem the tide of carnage attributable to impaired drivers. In the eighteen (18) years since *Miranda,* this Court has been presented with not so much as a bare allegation of highway safety officers having compelled or otherwise coerced statements from impaired motorists. Absent any such allegation and attendant proof, this Court should not impose the strictures of *Miranda* upon impaired driving arrests and thereby aggravate what is already an all too clear losing effort by the states to remove impaired motorists from this nation's thoroughfares.

ARGUMENT

THE DECISION IN *MIRANDA v. ARIZONA* DOES NOT MANDATE THAT A HIGHWAY SAFETY OFFICER RECITE THE PROPHYLACTIC "MIRANDA WARNINGS" PRIOR TO ROUTINE AND INCIDENTAL QUESTIONING OF A MOTORIST ARRESTED FOR IMPAIRED DRIVING.

A. The Perceived Evils Of Custodial Interrogation Which Predicate The Analytical Underpinnings Of The *Miranda* Decision Are Not Inherent To The Pro Forma Questioning Of A Chemically Impaired Motorist.

The decision in *Miranda v. Arizona,* 384 U.S. 436 (1966), is inapplicable to routine arrests made for highway safety violations. The perceived potential for police abuse which gave rise to the prophylactic warnings promulgated in *Miranda* simply does not exist in the highly structured context of highway safety enforcement. The analytical underpinnings of *Miranda* are predicated upon the view that Fifth Amendment values can only be secured by additional, rigid safeguards when an incommunicado suspect is confronted by experienced interrogators intent upon eliciting a confession to a serious crime. Such circumstances were deemed inherently coercive and thereby necessitated a pre-interrogation notification and waiver of the right to remain silent and consult with counsel. This notification of rights and intentional relinquishment thereof was viewed as imperative in order to assure that statements elicited in such an inherently oppressive atmosphere were in fact the pro-

duct of an accused's volitional consciousness. While acknowledging that the warnings fashioned in *Miranda* placed restrictions upon the acquisition of statements, the Court viewed such limitations as warranted in light of the psychological coercion endemic to skilled interrogation techniques conducted in an oppressive setting and with the sole design toward eliciting incriminating statements.

That *Miranda* must be viewed in the context of the evils which spawned its origin is best demonstrated by reference to the opinion itself. The following is representative language from the *Miranda* opinion:

> . . . the manner in which constitutional rights of the individual could be enforced against overzealous police practices.
>
> 384 U.S. at 444.
>
> * * *
>
> In each [case before the Court], the defendant was questioned by police officers, detectives, or a prosecuting attorney in a room in which he was cut off from the outside world. . . .They all thus share salient features - incommunicado interrogation of individuals in a police - dominated atmosphere . . . *An understanding of the nature and setting of this in-custody interrogation is essential to our decisions today.*
>
> 384 U.S. at 445. [emphasis added].
>
> * * *

. . . we concern ourselves primarily with this interrogation atmosphere and the evils it can bring.

384 U.S. at 456.

* * *

In each of the cases, the defendant was thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures.

384 U.S. at 457.

* * *

Unless adequate *protective devices* are employed to dispel the compulsion inherent in custodial surroundings, . . .

384 U.S. at 458. [emphasis added].

* * *

The entire thrust of police interrogation there, as in all the cases today, was to put the defendant in such an emotional state as to impair his capacity for rational judgment.

384 U.S. at 456.

* * *

We have concluded that without proper *safeguards* the process of in-custody

> interrogation of persons suspected or accused of crimes contains inherently compelling pressures . . . *In order to combat the pressures* . . .
>
> 384 U.S. at 467. [emphasis added].

The foregoing excerpts from the *Miranda* opinion could not more clearly demonstrate that the prophylactic warnings judicially crafted therein were to meet an express evil and to combat a perceived potential for police abuse.

The balance struck by the Court in *Miranda* can thus only be analyzed in terms of the dangers which it sought to dissipate. In the routine and daily enforcement of highway safety laws, the ominous poetential for abuse detailed in *Miranda* is wholly absent. As the calculus which occasioned the analysis underlying *Miranda* is inapposite to the nature of the contact between highway safety officers and impaired motorists, extension of the prophylactic rule fashioned therein is analytically indefensible.

The rule enunciated in *Miranda* is not constitutionally compelled but, rather, of prophylactic origin. *Michigan v. Tucker*, 417 U.S. 433, 444 (1974). The *Miranda* decision observed that the Fifth Amendment is ". . . as broad as the mischief against which it seeks to guard." 384 U.S. at 459-460. The circumstances faced by an impaired motorist who is detained by a highway patrol officer stand in stark contrast to those of an incommunicado suspect facing the rigors of a skilled detective schooled in the subtle art of interrogation. A highway enforcement officer ordinarily confronts only those motorists who have committed infractions in his

presence. While any motorist undoubtedly feels a degree of anxiety when summoned to halt his vehicle by the universally recognized flashing lights of a highway patrol cruiser,[2] the *de minimus* psychological discomfort occasioned thereby is so commonplace so as to have been experienced by literally millions of American citizens. To equate the routine confrontation between a highway patrolman and an errant driver with the evils chronicled in *Miranda* both ignores the express language of the *Miranda* decision and serves to trivialize its analytical underpinnings. If the decision adopted by the *Miranda* court is to be applied with such rigidity, it is transformed from a safeguard against a perceived abuse into an integral and constitutionally mandated dictate of the Fifth Amendment to the Bill of Rights. This is precisely the result which the *Miranda* majority disavowed. 384 U.S. at 467.

During the entire eighteen (18) years subsequent to this Court's decision in *Miranda*, several states have *not* applied the prophylactic rule of *Miranda* to routine traffic arrests. In almost two decades, this Court has not been presented with any evidence of police abuse or coercion in highway traffic settings. The simple explanation for this lack of abuse lies in the fact that highway safety officers are not possessed of any incentive or motivation to compel a drunk driver to be a witness against himself as that concept is embodied in the Fifth

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[2] In *Delaware v. Prouse*, 440 U.S. 648 (1979), this Court observed:

> . . . these stops [referring to the flashing lights of a police cruiser] generally entail law enforcement officers signaling a moving automobile to pull over to the side of the roadway, by means of a possibly unsettling show of authority. [Such stops] interfere with freedom of movement, are inconvenient, and consume time . . . [and] . . . may create substantial anxiety.
>
> 440 U.S. at 657.

Amendment. The primary duty of a highway safety officer is to remove impaired motorists from the state thoroughfares. The officer's function is different in kind from that of a detective as it places a premium on expediency and sheer volume. Driving under the influence of alcohol or other drugs is uniformly a strict liability crime in the various states. An officer engaging an impaired motorist thus need not indulge in superfluous diatribes. Indeed, the very absence of a *mens rea* element preempts much of the concern articulated by the *Miranda* decision. 384 U.S. at 451-452. A highway safety officer's inquiries are thus inevitably pro forma pursuant to the particular "implied consent" statute of the state in issue.

It is beyond dispute that the *Miranda* decision engendered no small amount of debate among both bench and bar. Indeed, the dissent characterized the opinion as ". . . poor constitutional law [which] entails harmful consequences for the country at large." 384 U.S. at 504. Constitutional precepts aside, Justice Harlan ended his dissent by making the following prognostications:

> Today's decision leaves open such questions as *whether the accused was in custody,* whether his statements were spontaneous or *the product of interrogation, whether the accused has effectively waived his rights,* and *whether nontestimonial evidence introduced* at trial is the fruit of statements made during a prohibited interrogation, all of which are certain to prove productive of uncertainty during investigation and litigation during prosecution. For all these reasons, if further restrictions on police interrogation are desirable at this time, a more flexible

> approach makes much more sense than the Court's constitutional straitjacket which forecloses more discriminating treatment by legislative or rule-making pronouncements.
>
> 384 U.S. at 545. [emphasis added].

That Justice Harlan's four (4) above stated concerns came to fruition is apparent from this Court's ensuing decisions. [3]

Whether the decision in *Miranda* represents "poor constitutional law" is an issue which falls outside the question presently before this Court. One need not mount a frontal assault upon the prophylactic rule fashioned therein in order to prevail in the instant controversy. The *Miranda* decision is by its own terms analytically inapplicable to the routine and pro forma questioning of an impaired motorist. A contrary resolution can serve only to "constitutionalize" the Miranda warnings and thereby apply them to a context wholly foreign to that which gave rise to their origin. Such result is both logically and analytically indefensible.

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[3] Custody: e.g., *Mathis v. United States*, 391 U.S. 1 (1968); *Orozco v. Texas*, 394 U.S. 324 (1969); *Oregon v. Mathiason*, 429 U.S. 492 (1977); *California v. Beheler*, _____U.S._____, 77 L. Ed. 2d 1275 (1983); Interrogation: *Rhode Island v. Innis*, 446 U.S. 291 (1980); Waiver: *North Carolina v. Butler*, 441 U.S. 369 (1979); Derivative Evidence: *Michigan v. Tucker*, 417 U.S. 433 (1974).

B. The Very Nature Of The Contact Between A Highway Safety Officer And An Impaired Motorist Precludes, As A Matter Of Pragmatism, Any Reasoned Application Of The Prophylactic Rule Of The Miranda Decision To Such Setting.

The contact between a highway safety officer and an arrested impaired motorist is different in kind from that of a detective and an incommunicado felony suspect. Be it benevolent or malevolent, the *Miranda* decision has provided at least a workable framework from which both interrogation specialists and the lower courts can work in the furtherance of felony interrogation. The issue presently before this Court is whether the prophylactic "Miranda warnings" should be extended beyond the perceived need articulated in the *Miranda* decision. To this end, it is essential to evaluate not only the motive or incentive for mischief by highway safety officers but, more importantly, the mandatory constraints under which they operate.

Several states, including Ohio, have recognized the fundamental distinction between the nature of the questioning of an impaired motorist by a highway safety officer and the "custodial interrogation" contemplated by the *Miranda* decision. *See e.g., State v. Pyle,* 19 Ohio St. 2d 64, 249 N.E. 2d 826 (1969), *cert. denied,* 396 U.S. 1007 (1970); *State v. Neal,* 476 S.W. 2d 547 (Mo. 1972); *State v. Gabrielson,* 192 N.W. 2d 792 (Iowa 1971), *cert. denied,* 409 U.S. 912 (1972); *State v. Lewin,* 163 N.J. Super. 439, 395 A. 2d 211 (1978), *cert. denied,* 444 U.S. 906 (1979); *Capler v. City of Greenville,* 207 So. 2d 339 (Miss. 1968), *cert. denied,* 392 U.S. 941 (1968); *State v. Angelo,* 251 La. 250, 203 So. 2d 710 (1976); *State v. Bliss,* 238 A. 2d 848 (Del. 1968). At least one federal circuit court has recognized the distinction. *Clay v. Riddle,* 541 F.2d 456 (4th Cir. 1976).

Other courts have simply assumed without analysis that the *Miranda* decision encompasses every custodial encounter with a law enforcement officer. Such a misconception has ordinarily found its origin in a literal and liberal interpretation of the following language in *Miranda:*

> By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody *or otherwise deprived of his freedom of action in any significant way.*
>
> 384 U.S. at 444. [emphasis added] [footnote omitted].

It is the above emphasized language which gives rise to the "custody analysis". Such analysis focuses not upon whether the *Miranda* decision is or should be applicable to the questioning of a motorist detained for impaired driving, but rather, the point at which the motorist is ". . . deprived of his freedom of action in any significant way". This analysis is not only grounded upon an erroneous precept, i.e., that *Miranda* should be rotely applied to every encounter with a law enforcement officer, but leads to wholly anomalous results.

The lower courts are in marked disagreement as to the precise point at which an impaired motorist experiences ". . . 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest."[4]

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[4] A comprehensive analysis of the differing views adopted by the various jurisdictions is contained in the petition for writ of certiorari presently pending before this Court in *Oregon v. Roberti,* No. 82-315 (petition filed August 20, 1982, 52 U.S.L.W. 3095).

California v. Beheler, _____U.S._____, 71 L. Ed. 2d 1275, 1279 (1983), *citing Oregon v. Mathiason*, 429 U.S. 492, 495 (1977). However, the divergent views may be analyzed in terms of three (3) generalized categories. The subjective intent test views custody as attaching at the point at which the officer forms the unarticulated intent to effectuate an arrest. This analysis has been expressly rejected by this Court.[5] *California v. Beheler*, _____U.S. _____, 71 L. Ed. 2d at 1279 n.2. The reasonable man test of custody is equally unavailing as any motorist forced to halt, exit his vehicle and thereupon perform a field sobriety test will "reasonably" perceive himself as being "in custody" as a layman understands that term. The formal arrest standard is a judicial fiction as it predicates the admissibility of statements solely upon the timing of the highway safety officer's formal articulation of an impaired motorist's custodial status. In his dissent in *Oregon v. Mathiason*, 429 U.S. at 449 n.5, Justice Marshall cogently observed the potential for mischief that the adoption of the formal arrest test would create by stating:

> I trust today's decision does not suggest that police officers can circumvent Miranda by deliberately postponing the official "arrest" and the giving of Miranda warnings until the necessary statements have been obtained.

In the context of a highway safety arrest none of the three (3) custody tests provides a workable framework to assess custody as this Court has intended the term.

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[5]While rejected by this Court, the subjective intent test is embraced by at least one jurisdiction. *See State v. Roberti*, 293 Or. 59, 644 P. 2d 1104, *on rehearing*, 293 Or. 236, 646 P. 2d 1341 (1982).

Reasoned application of *Miranda* to highway safety arrests is further frustrated by the almost uniform adoption of implied consent laws by the states.[6] This Court has approved implied consent laws in a variety of contexts. *See e.g., Schmerber v. California,* 384 U.S. 757 (1966); *Mackey v. Montrym,* 443 U.S. 1 (1979); *South Dakota v. Neville,* _____U.S._____, 74 L. Ed. 2d 748 (1983). Such statutes require that upon probable cause a motorist be taken into custody for at least conveyance to a facility wherein a chemical test can be performed. The highway safety officer must of necessity engage in a modicum of dialogue with the impaired driver and make inquiry as to whether he will consent to the test. In such setting, application of *Miranda* is impracticable and could well result in an impaired motorist refusing the chemical test solely as a consequence of confusion caused by the irreconcilable statements made by the highway patrolman.

A final impracticability of *Miranda* in the impaired motorist context is that it loses its bright-line effect. In the felony interrogation setting, the prophylactic precepts articulated in *Miranda* serve to both regulate police conduct and provide lower courts with a ready rule with which to assess the admissibility of statements elicited. The *Miranda* decision is, however, two-fold and requires not only recitation of the warnings, but a knowing and intelligent waiver of such warnings. 384 U.S. at 475, *citing Johnson v. Zerbst,* 304 U.S. 458 (1938). Application of *Miranda* to impaired drivers thus actually inter-

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[6] As of 1982, forty-five (45) states and the District of Columbia have adopted implied consent laws. National Highway Safety Administration; U.S. Department of Transportation, *A Digest of State Alcohol-Highway Safety Related Legislation* (Second Edition) (DOT HS 806 480 August 1983) p. 2-1, 2-2.

jects a needless element of uncertainty with respect to any statements made. It is difficult indeed to demonstrate that a motorist who has shown himself to be incapable of driving an automobile in a straight line is at the same time possessed of the cognitive wherewithal to form an intelligent decision with respect to the waiver of Miranda warnings. This dichotomy leads to the anomalous result that the greater the degree of impairment, the more susceptible any statements are to a pretrial suppression motion.[7] This bizarre result alone counsels against extension of *Miranda* to the impaired motorist context.

C. The National Epidemic Of Impaired Drivers Mitigates Against Extension Of The Miranda Decision Absent Evidence Of Abuse During The Routine And Brief Questioning Of Such Motorists.

In *South Dakota v. Neville*, _____U.S._____, 74 L. E. 2d at 755, this Court alluded to the nationwide dilemma of impaired drivers as follows:

> The situation underlying this case — that of the drunk driver — occurs with tragic frequency on our Nation's highways. The carnage caused by drunk drivers is well documented and needs no detailed recita-

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[7] This seemingly ludicrous result is not without concrete foundation. The victory obtained by the State in *South Dakota v. Neville*, _____U.S. _____, 74 L. Ed. 2d 748 (1983) may well have been pyrrhic. As this Court observed, Neville's case was remanded "for a determination whether [his] statement that he was too drunk to pass the test was made after a voluntary waiver of his right to remain silent." _____U.S._____, 74 L. Ed. 2d at 755 n.6. Neville had consumed "close to one case" of beer.

> tion here. This Court, although not having the daily contact with the problem that the state courts have, has repeatedly lamented the tragedy. *See Breithaupt v. Abram,* 352 US 432, 439, 1 L Ed 2d 448, 77 S Ct 408 (1957) ("The increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield"); *Tate v. Short,* 401 US 395, 491, 28 L Ed 2d 130, 91 S Ct 668 (1971) (Blackmun, J., concurring) (deploring "traffic irresponsibility and the frightful carnage it spews upon our highways"); *Perez v. Campbell,* 402 US 637, 657 and 672, 29 L Ed 2d 233, 91 S Ct 1704 (1971) (Blackmun, J., consurring) ("The slaughter on the highways of this Nation exceeds the death toll of all our wars"); *Mackey v. Montrym,* 443 US 1, 17-18, 61 L Ed 2d 321, 99 S Ct 2612 (1979) (recognizing the "compelling interest in highway safety").

While forcefully stated, the foregoing actually fails to sufficiently emphasize the scope of this Nation's struggle against drunk and otherwise chemically impaired drivers.

Statistics compiled by the National Highway Safety Administration indicate that in 1982 alcohol impaired drivers alone accounted for 28,000 fatalities, 670,000 injuries, 2,600,000 lost working days, 2,500,000 damaged vehicles, and an aggregate cost of 24 billion dollars. The leading cause of death for Americans from 15 to 24 years of age is drunk driving and an average of 14 teenagers are killed and another 360 are injured every day on our

Nation's highways. National Highway Traffic Safety Administration; U.S. Department of Transportation, *A Digest of State Alcohol-Highway Safety Related Legislation* (Second Edition) (DOT HS 806 480 August 1983) p. iii. Excluding entirely other impaired motorists, drunk drivers cause 47 percent of all traffic fatalities, 11 percent of all personal injury crashes, and 5 percent of all property damage accidents. National Highway Traffic Safety Administration; U.S. Department of Transportation, *Alcohol Involvement in Traffic Accidents* (DOT HS 806 269 May 1982) p. 1. In 1982, an estimated 1,788,400 arrests were made for driving while under the influence. This represents a 44.7 percent *increase* in the period from 1973-1982. During that same period, arrests of persons under eighteen (18) years of age escalated 96 percent. Gender serves as no immunity to the epidemic; during the ten (10) year period arrests of impaired females rose by 121.6 percent and arrests of females under eighteen (18) went up a staggering 234.4 percent. Federal Bureau of Investigation; U.S. Department of Justice, *Crime in the United States: Uniform Crime Reports, 1982,* Washington D.C.: U.S. Government Printing Office, September 11, 1983. p. 167-174. Each year, two percent of all licensed motorists are arrested for driving while under the influence. Of such arrests, 66 percent result in conviction. Of those arrested, 20 percent refuse to take a chemical test. National Highway Traffic Safety Administration; U.S. Department of Transportation, *A National and State Alcohol Assessment 1978 Through 1981* (DOT HS 896 313 December 1982) p. 10.

While several states have supposed mandatory incarceration for first offender impaired motorists, only nine (9) states typically impose a jail sanction on first offenders. In 1982 alone, twenty-two (22) states and the District of Columbia enacted new driving under the

influence legislation. National Highway Traffic Safety Administration; U.S. Department of Transporation, *DWI Sanctions: The Law and Practice* (DOT HS 806 417 June 1983) p. III-2 and Appendix C 1-7. There are an estimated 21,000 judges nationwide who adjudicate highway safety cases and a substantial portion of their caseloads is spent in impaired driving litigation. Each jurist presides over an average of eighty-five (85) driving under the influence casses annually. *Presidential Commission on Drunk Driving; Final Report* (November 1983) p. 17. Prominent among the recommendations of the Presidential Commission was that "laws, policies and procedures should be adopted to expedite arrest, booking, and charging procedures. . .in order to return officers to patrol duties as soon as possible and to increase significantly the efficiency of the entire arrest process." *Id.* at 15-16.

The extension of *Miranda* to the impaired motorist context will serve to needlessly expend time during the arrest and processing procedures and provide for a built-in pre-trial suppression motion regarding the knowing and intelligent waiver of the "Miranda warnings." While the core values of the Fifth Amendment must never be sacrificed for the sake of expediency, the prophylactic warnings promulgated in *Miranda* are not of constitutional origin. There exists no documentation reflecting abuse by highway safety officers so as to warrant the need for additional safeguards to ensure that statements made by impaired drivers are not compelled as that term is embodied in the Fifth Amendment. The legacy of carnage occasioned by impaired motorists is a national disgrace and the states have thus far been unable to stem its tide. Absent demonstrable evidence of abuse, this Court should not interject the strictures of *Miranda* into a battle which is already being lost to the common detriment of all American citizens.

CONCLUSION

For the reasons stated above, the circuit court erroneously applied the decision in *Miranda v. Arizona* to the voluntary statements admitted into evidence. As such, the decision of the circuit court should be reversed.

Respectfully submitted,

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ATTORNEYS FOR AMICUS CURIAE
STATE OF OHIO

CERTIFICATE OF SERVICE

Pursuant to Rule 28.5(b) of the Rules of the Supreme Court, I hereby certify that the requisite number of copies of the foregoing Brief of Amicus Curiae State of Ohio have been served on petitioner, Harry J. Berkemer, by forwarding such copies through the office of petitioner's counsel of record, Alan C. Travis, Assistant Prosecuting Attorney, Hall of Justice, 369 South High Street, Columbus, Ohio 43215, and respondent Richard N. McCarty, by forwarding such copies through the office of respondent's counsel of record, R. William Meeks, 503 South High Street, Columbus, Ohio 43215, by United States Mail, postpaid, this _____ day of February, 1984.

RICHARD DAVID DRAKE
Assistant Attorney General

No. 83-710-CFH
Status: GRANTED

Title: Harry J. Berkemer, Sheriff of Franklin County, Ohio, Petitioner
v.
Richard N. McCarty

Docketed:
October 27, 1983

Court: United States Court of Appeals for the Sixth Circuit

Counsel for petitioner: Travis, Alan C.

Counsel for respondent: Meeks, R. William

Entry	Date	Note	Proceedings and Orders
1	Oct 27 1983	G	Petition for writ of certiorari filed.
3	Nov 21 1983		Order extending time to file response to petitior until December 12, 1983.
4	Dec 14 1983		Brief of respondent Richard N. McCarty in opposition filed.
5	Dec 14 1983		DISTRIBUTED. January 6, 1984
6	Jan 9 1984		Petition GRANTED.
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7	Feb 27 1984		Joint appendix filed.
8	Feb 27 1984		Brief of petitioner Berkemer, Sheriff filed.
9	Feb 27 1984		Brief amicus curiae of State of Ohio filed.
10	Mar 7 1984		Record filed.
11	Mar 7 1984		Certified original record & C.A. proceedings, 2 volumes received.
12	Mar 20 1984		SET FOR ARGUMENT. Wednesday, April 18, 1984. (3rd case)
13	Mar 24 1984	D	Motion of respondent for divided argument filed.
14	Mar 27 1984		Brief of respondent Richard N. McCarty filed.
15	Mar 26 1984		Brief amicus curiae of ACLU, et al. filed.
16	Mar 27 1984		CIRCULATED.
17	Apr 2 1984		Motion of respondent for divided argument DENIED.
18	Apr 7 1984	X	Reply brief of petitioner Berkemer, Sheriff filed.
19	Apr 18 1984		ARGUED.